FEB 16 1957
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 778

AIRCOACH TRANSPORT ASSOCIATION, INC.,
QUAKER CITY AIRWAYS, INC.,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
NATIONAL AIRLINES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALBERT F. BEITEL
JOHN H. PRATT
Counsel for Petitioners
905 American Security Building
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Aircoach Transport Association, Inc., and Quaker City Airways, Inc., petitioners,[1] pray that a writ of

[1] Aircoach Transport Association, Inc., is a non-profit cooperative, including among its members 35 carriers, each of which was a party applicant before the Civil Aeronautics Board in this case. The Association was granted leave to intervene, and participated in this case in the court below. (R. 823) Quaker City Airways,

certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on July 19, 1956, and the Court's order entered on September 19, 1956, denying motion for rehearing.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 98 U. S. App. D. C. 348, 235 F. 2d 845, and 4 Avi. 18,169 (CCH). The Opinions of the Civil Aeronautics Board (R. 452; 625) have not yet been officially reported, and are only partially reported at 1A Aviation Law Review 14,443, 14,553 (CCH).

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia Circuit was entered on July 19, 1956, and petitioner's motion for rehearing was denied on September 19, 1956. By order dated December 12, 1956, the Chief Justice of the United States extended the time for filing this petition to and including February 16, 1957. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1) and by Section 1006(f) of the Civil Aeronautics Act of 1938, as amended, 52 Stat. 1024, as amended by 63 Stat. 107, 49 U.S.C. 646(f).

Inc., one of the Association's members, was likewise granted leave to intervene. (R. 753) However, the Association presented the case for all of its members, including Quaker City Airways, Inc. The Association will perform the same function in this Court. The respondents objected to the intervention by the Association in the court below, which objection was overruled. If a similar objection is made in this Court, and sustained, Quaker City Airways, Inc., will prosecute the case in this Court.

QUESTIONS PRESENTED FOR REVIEW

1. When the Civil Aeronautics Board finds an immediate need for a special type, "supplemental" air service, may the Board temporarily authorize such service by exemption, and specifically reserve the question of whether such service should be authorized by certificates, pending the conclusion of the proceeding?

2. May the Civil Aeronautics Board create a special class of air carriers and authorize them to provide needed supplemental service without first deciding whether its scheme for permanent authorization of such air service should be by exemption or by certificate?

3. When a class of air carriers have been operating under an exemption which has been in existence for eighteen years and the Civil Aeronautics Board continues to regulate the class by the exemption process, must the Board again state its reasons for not regulating the class by the certification process?

4. Did not the Civil Aeronautics Board set forth sufficient findings of fact to support its decision to permit supplemental air carriers to engage in supplemental air transportation by exemption authority?

5. Was the Court of Appeals correct when it required of the Civil Aeronautics Board a line of reasoning and a series of related findings on the question of why the certification process was not used, although the Board specifically reserved that question and did make sufficient findings to support the use of the exemption process?

6. Does a change in an exemption authorization from an unlimited number of irregular common

carriage flights to a limited number of common carriage flights and an unlimited number of charter flights move the authorization so "much closer to the certificated services" that the Court may substitute its judgment that certificates should be issued for the Board's judgment that the exemption process should be used?

STATUTES INVOLVED

The pertinent sections of the Civil Aeronautics Act here involved are set forth in the Appendix to this petition.

STATEMENT OF THE CASE

In 1938, the Congress adopted the Civil Aeronautics Act to encourage and to develop aviation. That Act, as amended, created the Civil Aeronautics Board[2] and conferred upon it the duty of developing, as well as regulating, the civil aviation industry.

During the eighteen years since the Civil Aeronautics Act was developed, the technological evolution of aviation has been so great as to stagger the imagination. Development, expansion, experimentation—within the regulatory framework—are the great concern of the Civil Aeronautics Board.

In 1938, there were many more hours of private, nonscheduled, and miscellaneous flying than hours of flight by scheduled airlines. A dichotomy between scheduled and nonscheduled flying was quickly established by the newly-created Civil Aeronautics Board. One principal reason for this dichotomy is that the carrier certificated to carry air mail was

[2] Sometimes herein referred to as "the Board".

entitled to and did receive subsidy payments. The carriers who transported mail and operated regular routes on regular schedules were authorized to operate by virtue of certificates of public convenience and necessity issued pursuant to Section 401 of the Civil Aeronautics Act. The carriers who did not operate over regular routes with regular schedules — known variously as "nonscheduled," "irregular," and "independent" airlines—were authorized to operate by a class exemption issued under Section 416 of the Civil Aeronautics Act.

The exemption was granted in such terms that the existing nonscheduled carriers, as well as later formed companies, could engage in operations without a hearing, and without a certificate of public convenience and necessity.[3]

The Board has written the history of the next few years:

> "Conditions at the end of World War II, however, brought about a rapid expansion in the activities of the irregular carriers. First, the civilian demand for air travel increased tremendously after the war, and the certificated carriers, whose activities were severely limited during the war period, were faced with the problem of expanding their operations to meet the growing demand for air service. Second, a substantial number of veterans trained in the techniques of aviation sought to enter the field of aviation as independent operators. Their entry into the field was facilitated by the availability of surplus military aircraft, mostly C-46's and C-47's, which

[3] All carriers were strictly regulated with respect to safety, and rigid safety requirements were imposed upon all classes of carriers. This case concerns only the economic regulation of the carriers.

could be leased or purchased at a relatively small cost. Equipped with the larger aircraft, the irregulars sought to satisfy the enlarged demand which the certificated carriers were unable to meet. The traveling public readily accepted and patronized the rapidly expanding services of the irregulars to the point that they now constitute an important segment of the air transportation industry.

"Today, some fifty irregular air carriers provide a wide variety of services, domestically, overseas, and in foreign air transportation. These services are rendered primarily with DC-3, DC-4 and C-46 aircraft, although some of the larger carriers now operate Constellation and DC-6 aircraft. The services performed by the irregular carriers are of various types, including charter operations, individually-ticketed coach flights, specialized services, and military airlift. In the year 1954, the passenger operations of irregular carriers resulted in the generation of 1,252,680,000 revenue passenger miles. For the same period, cargo operations amounted to 54,249,000 cargo ton miles." (R. 459-460)

The Board, from time to time, had amended the exemption order under which the non-certificated carriers operated, and on September 21, 1951, instituted the instant proceeding. The proceeding before the Board encompassed, *inter alia:*

(1) An investigation to determine whether there was a public need for the services conducted by the non-certificated carriers, in addition to and supplemental to the services performed by certificated carriers and, if so,

(2) the type or types of supplemental service best adapted to meet the need;

(3) whether the Board was empowered to authorize such services by certificate under Section 401 or by exemption under Section 416;

(4) what conditions or other requirements should be imposed on the operations of these carriers. (R. 666-673)

The proceeding thus created was destined to become the longest case in the history of the Board. Sixty-three non-certificated carriers were made parties to the case, and given an opportunity to be heard.

In a sense, the case is a phase of the age-old battle between big business and small business. The positions of the two adversaries may be briefly stated. The certificated carriers contended that all individually-ticketed traffic should be reserved for those carriers who had acquired grandfahter rights under the 1938 statute. The supplemental carriers claimed that they should be continued in the new fields which they had developed while operating under exemption authority, and be permitted to share, in increasing degree, in the new traffic. The issue, simply stated, was the extent to which the new airline companies should be allowed to operate.

While the case was in progress before hearing examiners, and 30 applicants remained to be heard, the Board entered a procedural order.

The Board noted that the proceeding had two general purposes: (1) questions of public interest touching the role, if any, to be assigned to the non-certificated carriers to meet the requirements of the public convenience and necessity; and (2) questions of fitness and ability involving which of the various

applicants should be granted operating authority. Finding that the expeditious handling of the proceeding required its action, the Board separated the two classes of issues. First, it directed that the hearing continue in the earliest feasible time upon the "public interest" questions and, second, it deferred hearing of the fitness and qualification issues. (R. 711-715)

Hearings on the public interest issues were completed, an initial decision issued, oral argument was held before the Board, and the Board issued its decision. (R. 452-506)

The Board in its opinion found that there was a public need for supplemental service; that the demands for such service cannot be met by the certificated carriers; that the supplemental service was required by considerations of national defense; that the applicants' financial condition could and should be improved; that the old regulations had outlived their usefulness; that urgent action was necessary; that a temporary exemption was required in the public interest; that the present enforcement of section 401(a) of the Act constituted an undue burden on the class of supplemental air carriers by reason of the limited extent of, and unusual circumstances affecting, the operations of this class of air carriers.

Having reached these conclusions, the Board issued an order which created a class of supplemental air carriers and modified the operating authority formerly held by these carriers. The old regulation permitted the carriers to operate an unlimited number of charter and common carriage trips, but required the trips to be spaced at irregular intervals; the new regulation, permits an unlimited number of charter trips, but only

10 common carriage trips per month, and removes the requirement that trips be operated at irregular intervals.

The certificated carriers filed motions for reconsideration before the Board, which were denied. The certificated carriers filed petitions for review in the United States Court of Appeals for the District of Columbia Circuit. Upon review, that court reversed the order of the Board. It is that decision which your petitioners seek to have reviewed by this Court.

BASIS FOR FEDERAL JURISDICTION

The proceeding arose by virtue of applications before, and an investigation instituted by, the Civil Aeronautics Board pursuant to the provisions of the Civil Aeronautics Act. The orders of the Civil Aeronautics Board are subject to review by the United States Court of Appeals, and venue lies in that Court, as provided by Section 1006 of the Civil Aeronautics Act, 52 Stat. 1024, as amended by 63 Stat. 107, 49 U.S.C. 646.

REASONS FOR GRANTING THE WRIT

This case presents questions of public importance relating to the administration of the Civil Aeronautics Act. It also concerns the development of a class of supplemental air carriers whose services are demanded by the national defense and cannot otherwise be made available to the public. It involves the operating authority of some 66 supplemental air carriers, reduced by attrition to 49. These air carriers own and lease, as of the third quarter of 1953, a fleet of 97 airplanes, including 72 twin-engine and 25 four-engine transport planes. They fly billions of revenue

passenger-miles and millions of cargo ton-miles in aircoach, air charter, and military operations. It is their operating authority which is at stake.

I.

In this proceeding, the Civil Aeronautics Board was faced with the problem of changing its regulations which governed the operations of a large and important class of carriers. Originally, the Board had in effect a regulation which authorized an air carrier to engage in "non-scheduled" operations without first obtaining a certificate of public convenience and necessity from the Board. The post World War II growth of aviation and the availability of low priced surplus airplanes, which the Congress directed should be sold first to veterans, catapulted this class of carriers into new and expanding fields. They originated "aircoach" service and "all freight" service. (R. 459-463)

The Civil Aeronautics Board did not issue certificates to these carriers as they expanded into new fields, but continued to regulate their activities through exemptions. As could be expected, the certificated "grandfather" carriers opposed the development of these new carriers. The battle raged not only in the market place and before the Civil Aeronautics Board, but also in the Congress.

The Senate Select Committee on Small Business, after hearings, issued a report which, in pertinent part, recommended:[4]

> "Your committee recommends that the Civil Aeronautics Board should—

[4] Report No. 822, 83rd Cong., 1st Session, July 31, 1953, p. 17.

"1. *Issue a temporary regulation permitting the irregular carriers to fly 14 round-trip flights a month between any two points, pending the conclusion of the Large Irregular case.* — There appears to be ample authority for these operations under section 416 of the Civil Aeronautics Act. The Board should permit these flights to be pooled over a year's period so that the carriers can provide the supplementary type of air service in peak periods that the Board has suggested as the real place for these companies. Carriers operating under this broad authority should also be eligible for the movement of military personnel under contract to the Defense Department and for the movement of mail without subsidy under contract to the Post Office Department without regard to frequency or regularity of service."

Almost as though it considered the Committee Report a blueprint for action, the Civil Aeronautics Board took the action the Committee Report called for. First, it instituted the investigation, which is this proceeding. Then, it decided to permit the supplemental carriers to operate 10 trips per month (instead of 14 recommended in the Committee Report). The Board accordingly amended the regulations which governed the class of supplemental carriers to permit them to operate their new services.

The Board's action was not hasty. It had completed about one-half (in number of carriers) of its investigation when it decided to split the issues of the investigation into two parts: (1) the general public interest questions relating to the role of the supplemental carriers, and (2) the selection of qualified carriers.

The Board then proceeded to decide the public interest questions and, in its opinion, specifically stated:

> "Most of the applicants request that the authority to be granted them be in the form of a certificate, while most of the certificated interveners vigorously challenge our authority to grant certificates for supplemental operations. We need not decide that issue at this time. It would be more appropriate for us to determine the matter when we consider the qualifications of the individual applicants. Accordingly, this opinion is a statement of our future policy with regard to supplemental air transportation, and we shall defer to the conclusion of the case our decision as to whether the operating authority to be granted to the applicants who qualify shall be by certificate or by exemption. Pending decision on these matters, however, we see no reason to withhold the enlarged operating authority from this class of carriers." (R. 486-487)

Thus, the Board issued an interim exemption order to permit necessary operations until it decided if certificates should be issued.

The court below reversed the Board because the Court "cannot ascertain from the opinion or order . . . why [the Board] thinks certification of this supplemental service would not be in the public interest." (R. 768) The court below is requiring from the Board a conclusion on an issue which the Board specifically reserved; thereby demanding much more than the Civil Aeronautics Act requires. The court, in effect, is reading into Section 416 of the Civil Aeronautics Act a requirement which the Congress did not include—a requirement which may prevent the Board from taking immediate action when the need arises.

II.

The decision of the court below is in conflict with one of its own decisions interpreting the same section of the Civil Aeronautics Act. In the air mail case[5] the Court interpreted Section 416 to mean that the Board could grant a temporary exemption while the issue of certification is being decided. In the air mail case the Court affirmed the Board; in the instant case it reverses the Board, although the Board acted the same way under the same section of the Act in each case. It is respectfully submitted that this Court should exercise its jurisdiction to clarify the confusion created by the decision of the court below, and to remove from air carriers and the Board the burdens placed upon them by the court below.

The decision of the court below is also in conflict, in principle, with the decisions of this Court; Section 416(a) of the Civil Aeronautics Act expressly authorizes the Board to "establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of such air carriers shall require . . ." and Section 416(b) authorizes the Board to "exempt from the requirements of this title . . . any air carrier or class of air carriers." In the administration of the Civil Aeronautics Act, the Board has created six separate classes of air carriers which it regulates through the exemption process.[6]

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[5] *American Airlines* v. *Civil Aeronautics Board*, 97 App. D.C. 324, 231 F. 2d 493 (D.C. Cir. 1956).

[6] Alaskan Air Carriers, Noncertificated Cargo Carriers, Indirect Air Carriers, International Air Freight Forwarders, Air Taxi Operators, and the Supplemental Carriers. (See parts 292, 295,

The Congress left it to the wisdom and technical ability of the Board to decide what classes of carriers should be established and what classes should be exempted. The court below, however, believes that the supplemental carriers "are moved much closer to the certificated services" — so much closer that the Board should not, in the Court's opinion, continue to regulate them under the exemption process. By this the court below invades the province of the regulatory agency. In *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177 (1938) this Court held that it was for the Interstate Commerce Commission—not the courts—to decide if a carrier was an "interurban" electric railway and therefore exempt from regulation under the Interstate Commerce Act. Here, it is for the Board, not the court below, to decide if the supplemental carriers should be certificated or exempted.

An even greater conflict between the decision of the court below and the decisions of this Court appears when the history of the supplemental carriers is considered. Ever since 1938, when the Civil Aeronautics Act was adopted, the Board has regulated by exemption those carriers which are limited in the number of flights which they may operate between the same points. In continuing to use the exemption process, the Board said in its opinion:

> "There is equally no sound foundation for the repeated assertion that we are in effect granting certificates for route type services. It is true that we are for the first time lifting the requirement of irregularity. But we are still adhering to the

296, 297 and 298 of the Economic Regulations of the Board; 14 F.R. 3550, 14 F.R. 3522, 21 F.R. 2511, 15 F.R. 1866, 18 F.R. 8080, respectively.)

> fundamental requirement of limited frequencies —and so long as a carrier is confined to ten flights per month, this represents a severe and practical limitation upon its ability to participate in any market, and in our judgment will effectively confine the carrier to operations that are essentially supplemental in character." (R. 481)

The court below disputes the Board's judgment in this respect and holds that the supplemental carriers are moved much closer to the certificated services. However, at this stage of the case, the Board's findings are presumed to be supported by the evidence of record, and the court below errs when it differs with the Board on a question of fact.

Whether the system for regulating the operations of these carriers by exemption which has existed for over eighteen years should be displaced by another system is a question committed to the administrative judgment of the agency. This Court so held in *Swift & Co.* v. *United States,* 343 U.S. 373, 382 (1952).

Clear and unambiguous application of Section 416 of the Civil Aeronautics Act, which affects not only the air carriers but the whole regulatory scheme of air transportation is, petitioners believe, an important federal question. It is significant enough for this Court to resolve the doubt surrounding the section for once and for all.

III.

The court below misconceived the nature of the Board's decision.

The court below says:	*The Board says:*
"The question therefore is . . . whether the requirement that this class of carriers be certified is not in the public interest." (R. 767)	"We need not decide that issue at this time. It would be more appropriate for us to determine the matter when we consider the qualifications of the individual applicants." (R. 486)
"The purport of the discussion in the opinion of the Board is that the exemption power may be exercised to accomplish the *permanent* ends it has in mind for these supplemental carriers . . ." (R. 769)	"We made it clear in our Opinion (p. 29) that the scope of operations which we have authorized is *not fixed and final*, but that we intend to maintain a surveillance over the operations of the supplemental air carriers, reserving the right on an expedited basis to adjust downward the number of permissible frequencies . . ." (R. 628-629)

By its decision the court below would hamstring the Board in its effort to maintain a surveillance and control over the supplemental carriers which are available under the exemption process, but not available under the certificate procedure. The Board's examiners had already issued their initial decision finding that the Civil Aeronautics Act did not authorize the Board to issue certificates for supplemental service. The court below seems to have differed with the examiners, but the Board itself did not decide this issue. This Court should exercise its jurisdiction to make it clear that the Board can issue interim exemption authority under Section 416 of the Civil Aeronautics Act without first deciding if it has power to issue certificate authority under Section 401(a) of the Act.

IV.

The court below requires the Board to incorporate a *rationale* in its opinion which this Court does not require of other administrative agencies. The court below did not attempt to ascertain why the Board acted as it did.[7] Instead it reversed the Board because the Board did not explain (to the satisfaction of the court) why it was using the exemption tool instead of another tool. That, petitioners submit, is a matter for the Board. As this Court has held, "[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . ." *Phelps Dodge Corp.* v. *National Labor Rel. Bd.*, 313 U.S. 194 (1941). The findings of the Board exceeded in particularity the findings of the Interstate Commerce Commission

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[7] There were ample reasons given in the opinion.

The court below agrees that the Board's opinion contains adequate findings to support the conclusion that "some action should be taken promptly." (R. 765-766)

The Board then made the specific finding:

> "As previously indicated, there remain thirty applicants who have not yet been heard with regard to their qualifications. It is, therefore, apparent that a considerable period of time will elapse before this case can be finally determined. To wait until the conclusion of the case before implementing our new policy would be contrary to the public interest." (R. 487)

Thus, the Board found not only that prompt action was necessary but also that certification would be delayed "for a considerable period of time."

The Board went further and found that "there exists *today* a need for the enlarged authority . . ." and "Also, many of the carriers . . . require the enlarged authority . . . for their continued economic well being." (R. 487)

which were held sufficient in *Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 351 U.S. 321 (1956).

V.

In reversing the Board, the court below adopted a concept which harkens back to the days of NRA and the fear of free competition which was bred during the depression of the 1930's. The court indicated that the "protection" of the certificated carriers "is required by the general scheme of the" Civil Aeronautics Act. This belief appears to pervade its entire opinion. (R. 755-771) However, the Civil Aeronautics Act, was not designed to *protect* but to *promote* and *develop* the new industry of air transportation. It specifically provides, in Section 2, for "encouragement," "promotion," "development," and "competition to the extent necessary to assure the sound development of an air-transportation system." The court below was so concerned with the protection of one group of carriers that it lost all interest in the fate of the group of supplemental carriers. The Board's interest and obligation is the overall public interest in a nationally adequate air-transportation system. It is this overall interest which the court below failed to consider. Petitioners submit that this Court, looking at the broad purposes of the Civil Aeronautics Act will confirm the Board's judgment.

VI.

The Board itself has not sought certiorari. Petitioners believe that the Board is not seeking for a review of the decision of the Court of Appeals because of a most unusual development which occurred after this petition was prepared.

The judgment of the court below reverses and sets aside the decision of the Board. (R. 755, 771) The judgment, however, does not become effective until a certified copy of opinion and judgment is transmitted from the court to the Board.

On December 21, 1956, the court entered an order staying the issuance of the certified copy of opinion and judgment "until sixty days after the final decision of the Board in the Large Irregular Air Carrier Investigation, C.A.B. Docket No. 5132, *et al.*" Consequently, the supplemental carriers will be allowed to continue to operate under their exemption authority until the Board decides the phase of the case on which it reserved decision. The Board probably feels that it need take no action, because its order will not be set aside by the Court.

Petitioners, however, are not so sanguine. This case has been split and split again.[8] There is no guarantee that the erroneous judgment of the court below will not become effective, and it is only by resort to this Court that petitioners can adequately protect their interests and secure the correction of the error made by the court below.

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[8] The issues were first split by the Board. The Court of Appeals split the "law" issues from those which require reference to the evidentiary record and considered only the "law" issues. This "experiment" of the court below was explained by Judge Prettyman at the 17th Annual Judicial Conference of the District of Columbia Circuit—1956, as reported in Vol. XXIII, No. 11 of the Journal of the Bar Association of the District of Columbia, p. 676.

CONCLUSION

Because the court below has decided an important question of Federal law in a way which is probably in conflict with its own decisions and the decisions of this Court, has misinterpreted an important statute of the United States, and has invaded the province of the Civil Aeronautics Board in a manner calculated to retard the development of an adequate air-transportation system, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

ALBERT F. BEITEL
JOHN H. PRATT
Counsel for Petitioners
905 American Security Building
Washington 5, D. C.

February 16, 1957

APPENDIX

Pertinent Statutes

28 *U.S.C.A. Section 1254 (1).* Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Civil Aeronautics Act of 1938, as amended:

Section 2. Declaration of policy

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or

advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Section 401(a). Certificate of public convenience and necessity

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on June 23, 1938, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

Section 416. Classification and exemption of carriers

(a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this subchapter as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and

regulations, pursuant to and consistent with the provisions of this subchapter, to be observed by each such class or group, as the Board finds necessary in the public interest.

(b) (1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this subchapter or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Board shall not exempt any air carrier from any provision of subsection (1) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B) to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of subsection (1) of section 401 of this title if the Board finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such

air carrier from such paragraphs would not adversely affect the public interest: *Provided,* That nothing in this subsection shall be deemed to authorize the Board to exempt any air carrier from any requirement of this chapter, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots.

Section 1006. Judicial Review.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 346 and 347 of Title 28.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13044

AMERICAN AIRLINES, INC., PETITIONER
NATIONAL AIRLINES, INC., INTERVENOR

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CAPITOL AIRWAYS, INC., QUAKER CITY AIRWAYS, INC., AIRCOACH TRANSPORT ASSOCIATION, and INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION, INTERVENORS

No. 13045

TRANS WORLD AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13048

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13052

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13054

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13061

UNITED AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13063

CONTINENTAL AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13064

NORTHWEST AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13068

ALLEGHENY AIRLINES, INC., et. al., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13116

WESTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13117

CAPITAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13118

BRANIFF AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13120

PACIFIC NORTHERN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13121

ABILENE & SOUTHERN RAILWAY COMPANY, et. al., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

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On Petitions for Review of Order of the Civil Aeronautics Board

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Decided July 19, 1956

Mr. Howard C. Westwood, with whom *Mr. Clifton J. Stratton, Jr.*, was on the brief for petitioner in No. 13044, argued for all petitioners and for intervenor National Airlines, Inc., in No. 13044. *Mr. Richard A. Fitzgerald* was on the brief for intervenor National Airlines, Inc., in No. 13044.

Mr. John F. Floberg for petitioners in No. 13068. *Mr. Edward DeGrazia* also entered an appearance for petitioners in No. 13068.

Mr. J. D. Feeney, Jr., with whom *Messrs. Amos M. Mathews* and *Thormund A. Miller* were on the brief, for petitioners in No. 13121.

Mr. James K. Crimmins was on the brief for petitioner in No. 13045. *Mr. William Caverly* also entered an appearance for petitioner in No. 13045. *Mr. W. Glen Harlan* was on the brief for petitioner in No. 13048. *Messrs. Henry J. Friendly, Robert C. Barnard* and *Leon Lipson* were on the brief for petitioner in No. 13052. *Messrs. L. Welch Pogue* and *James F. Bell* were on the brief for petitioner in No. 13054. *Mr. Robert L. Stern* was on the brief for petitioner in No. 13061. *Mr. James Francis Reilly* entered an appearance for petitioner in No. 13061. *Messrs. C. Edward Leasure* and *Herman F. Scheurer, Jr.*, were on the brief for petitioners in Nos. 13063 and 13064. *Messrs. L. Welch Pogue* and *James W. Callison* were on the brief for petitioner in No. 13116. *Messrs. Robert B. Hankins* and *Macon M. Arthur* were on the brief for petitioner in No. 13117. *Messrs. Hubert A. Schneider* and *B. Howell Hill* were on the brief for peti-

tioner in No. 13118. *Mr. Gerald P. O'Grady* was on the brief for petitioner in No. 13120.

Mr. O. D. Ozment, Chief, Litigation and Research Division, Civil Aeronautics Board, with whom *Mr. Franklin M. Stone,* General Counsel, Civil Aeronautics Board, *Mr. John H. Wanner,* Associate General Counsel, Civil Aeronautics Board, *Messrs. Robert L. Park, Gerald F. Krassa* and *Henry M. Switkay,* Attorneys, Civil Aeronautics Board, and *Mr. Daniel M. Friedman,* Attorney, Department of Justice, were on the brief, for respondent.

Mr. Albert F. Beitel, with whom *Mr. John H. Pratt* was on the brief, for intervenor Aircoach Transport Association, in No. 13044. *Messrs. Albert F. Beitel* and *John H. Pratt* entered appearances for intervenor Quaker City Airways, Inc., in No. 13044.

Mr. Coates Lear, with whom *Mr. Theodore I. Seamon* was on the brief, for intervenor Independent Military Air Transport Association, in No. 13044. *Messrs. Coates Lear* and *Theodore I. Seamon* entered appearances for intervenor Capitol Airways, Inc., in No. 13044.

Before PRETTYMAN, WILBUR K. MILLER, and FAHY, Circuit Judges.

PRETTYMAN, *Circuit Judge:* These are petitions to review an order of the Civil Aeronautics Board.[1] This order is the latest in a long series dealing with the problem of the non-scheduled or irregular air carriers. Petitioners are the certificated air carriers and certain railroads. The intervenors in behalf of the respondent are associations of irregular carriers. The respondent, of course, is the Civil Aeronautics Board. It is unnecessary to recite here the background of the present con-

[1] Order E-9744. Technically, a subsequent order, E-9884, denying reconsideration of the first order, is also involved.

troversy. It appears in its various stages in a long line of cases before this court and before the Board.[2]

The basic requirement heretofore imposed upon the irregular carriers by the Board has been that they operate without any reasonable semblance of regularity as to schedule or route. The basic change wrought by the present order is to remove this requirement of irregularity and to substitute in its place a maximum limitation upon the number of round trips permitted per month between any two points. The Board accomplishes this objective by granting these carriers an exemption under Section 416(b) of the Act.[3] The petitioners contest the validity of the order, so far as the present argument is concerned,[4] upon three basic grounds: (1) that the Act grants the Board no power to issue such an order; (2) that the order is not supported by the findings required by the statute; and (3) that the order is beyond the scope of the proceeding.

In 1951 the Board instituted a proceeding to determine its future policy with regard to Large Irregular

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[2] See, *e.g.*, Air Transport Associates v. Civil Aeronautics Board, 91 U.S. App. D.C. 147, 199 F.2d 181 (1952), *cert. denied*, 344 U.S. 922, 97 L.Ed. 710, 73 S.Ct. 386 (1953); American Air Transport v. Civil Aeronautics Board, 92 U.S. App. D.C. 117, 206 F.2d 423 (1953); Eastern Airlines v. Civil Aeronautics Board, 87 U.S. App. D.C. 331, 185 F.2d 426 (1950), *vacated*, 341 U.S. 901, 95 L.Ed. 1341, 71 S.Ct. 613 (1951); New England Air Express v. Civil Aeronautics Board, 90 U.S. App. D.C. 215, 194 F.2d 894 (1952); Large Irregular Carriers, Exemptions, 11 C.A.B. 609 (1950).

[3] 52 STAT. 1004 (1938), as amended, 49 U.S.C.A. § 496(b).

[4] The petitions for review presented, generally speaking, issues of law and also issues requiring examination of the evidentiary record. This record totaled fifty thousand pages. By a prehearing order under Rule 38(k) of the Rules of this Court, the court ordered that the issues of law be briefed, argued and decided and that pending such disposition the evidentiary issues be reserved.

Air Carriers.[5] Some sixty-six applicants were involved. Two examiners began hearings, in which not only the general problem was involved but the individual qualifications of the several applicants were treated as issues. Testimony as to about half of the applicants had been presented when the Board deferred further hearing on such qualifications and directed that the proceeding go forward upon the general questions. The examiners presented an initial decision. Exceptions to it were filed, and oral argument was held before the Board. A majority rendered a long opinion and an order. Two members dissented. In the order the Board recited that the enforcement of the certification provisions of the Act (Sections 401(a),[6] 404(a)[7] and 405(e)[8]) would be an undue burden on the carriers by reason of the limited extent of, and the unusual circumstances affecting, the operations of such carriers. It ordered that forty-nine of the applicants (naming them) be temporarily exempted from the certification requirements, subject to certain terms, and that each be issued an "Interim Operating Authorization" to terminate sixty days after the Board should dispose of the several individual applications for exemption authority. The terms attached to the order were long and in some detail. The principal one was that the carrier not engage in more than ten flights in the same direction between any single pair of points in any calendar month. In respect to this condition the Board said in its order:

> "Whenever, in the judgment of the Board, there is reason to believe that the foregoing ten flight

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[5] The proceeding was known as The Large Irregular Air Carrier Investigation, Docket No. 5132.

[6] 52 STAT. 987 (1938), as amended, 49 U.S.C.A. § 481(a).

[7] 52 STAT. 993 (1938), as amended, 49 U.S.C.A. § 484(a).

[8] 52 STAT. 995 (1938), as amended, 49 U.S.C.A. § 485(e).

limitation is insufficient to confine the operations of supplemental air carriers as a class to the rendition of the supplemental services for which they are authorized, and that the operations of such carriers pose a substantial threat to the stability and soundness of the certificated air carrier system, the Board may at any time reopen the proceeding and, after notice and opportunity for argument and with or without additional evidentiary hearing, make such downward adjustments in the maximum flight limitation as the Board may deem necessary or desirable. The interim operating authorizations granted by this order are herein expressly conditioned upon and subject to the reserved right of the Board to make further limitations, restrictions or modifications of the ten flight limitation, including a reduction in the number of such flights, to insure that the services remain supplemental."

The opinion of the Board makes clear that the ten flights per month may be conducted upon the basis of a regular schedule. The opinion also makes clear that the Board contemplated that these air carriers could offer unlimited charter operations on a plane-load basis in domestic carriage.

The reasoning of the Board may be summarized. It found that the services performed by the irregular carriers, including charter operations, individually ticketed coach flights, specialized services, and military air-lift, have proven of importance to both the irregular carriers and the public, meeting real needs. It concluded that its policy should be directed toward their survival and healthy growth. It determined that the services rendered by the irregular carriers could not be rendered satisfactorily by the presently certificated carriers, which have fixed commitments to route and schedule operation. It found that the elimination of the restriction against regularity would help the public and strengthen the supplemental carriers, and that it would aid in the administration and enforcement of regulations. The Board emphasized that

it selected the number ten as the number of permissible trips by taking into account on an average basis the number of permissible trips which might be operated by these carriers under heretofore existing regulations.

The Board turned its particular attention to the suggestion that the new scope of supplemental operations would open the door to unlimited competition which would affect adversely the certificated carriers. It held that the hard facts of economic realism would operate against such a situation, reciting in detail the considerations which led to this conclusion. It said it would not permit the supplemental carriers to combine and integrate their operations. It said it would "underscore for all concerned" that the supplemental carriers are to be restricted to needs they are designed to meet and that if they posed a threat to the certificated system "they must face up to a prompt and effective diminution in the maximum permissible flight frequencies."

The Board made a comparatively brief recital in respect to the undue burden upon the applicants and the unusual circumstances affecting their operations, a matter which we shall discuss in detail hereinafter. The Board reserved decision as to the nature and form of the authority to be granted for the supplemental air transportation it contemplated until the completion of the hearings upon the qualifications of the individual applicants, in the meantime issuing temporary authorization.

Petitioners vigorously attack the order upon the ground that it is not authorized by the statute. Section 416(b)(1) reads as follows:

> "The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it

> finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

It is clear that the foregoing provision has two basic parts. In the first place, in broad language, it empowers the Board to exempt any class of carriers from "any provision" of the statute or "any rule, regulation, term, condition, or limitation prescribed thereunder." This is sweeping language. The second basic provision in the paragraph is that in order to exert this broad power of exemption the Board must find that enforcement of the statutory provision is or would be "an undue burden" on the class of carriers by reason of the limited extent of, or unusual circumstances affecting, the operation of such carriers. The Board must further find that enforcement of the provision is not in the public interest.

This first point of petitioners is that the Board has no authority to issue this order as an exemption order with or without findings such as the ones described in the last clause of the quoted section. They say the order, in and of itself, is outside the scope of the quoted exemption section. The order, they say, represents something the Board cannot do by exemption. Although, as will develop, we think another contention dispositive of this proceeding, a ruling upon that other contention alone would leave the controversy in a wholly unsettled state. The parties have briefed and argued the point now before us, and we shall dispose of it. To treat it we must assume *arguendo* that valid findings as to undue burden and public interest are made.

The petitioners urge that the basic concept of the statute enacted by the Congress for the regulation of the air industry is of a certificated system. Section 401(a) specifically requires that no air carrier shall en-

gage in any air transportation unless there is in force a certificate issued by the Board. Various subsections, notably, *inter alia,* (d), (f) and (k) of Section 401, make provisions respecting certificates and certificated carriers. Petitioners say Congress did not intend that the Board might, by the use of the exemption provision of Section 416(b), destroy the elaborate basic requirements of the Act for a certificated system of airplane carriage. The petitioners are quite correct in that contention. Despite the broad language of Section 416(b) we think it is perfectly clear that the Congress did not set up so elaborate a series of provisions in respect to the certification of carriers, and the public interest, convenience and necessity therein involved, and at the same time grant its administrative agency power to destroy those elaborate provisions. We think there is and must be a boundary to the authority of the Board under its exemption power to impinge upon the certificated service.

But the Board does not disagree with the foregoing. Its position is that a sound national transportation system requires, from the standpoints both of the normal traveling public and of the national defense, a service supplemental to that which is and can be rendered by carriers certificated to routes, schedules and services. It declares that the proposed supplemental carriage must not in the aggregate jeopardize the certificated carrier system. It says that the main and basic transportation system must be a certificated system but that in addition there must be a supplemental service. It not only thus declares its position but, as we have seen, it inserted both in its opinion and in its order a specific provision that, if experience should show that the supplemental operation poses a substantial threat to the certificated system, adjustments will be made to prevent that result. The position of the Board is a rational one. There is undoubtedly a demand for charter service and for extra ticketed service in times of peak demand. If there is to

be supplemental service rendered, it seems rational that supplemental carriers, devoted entirely to that task, should be authorized to operate. We accept the declarations of the Board in these respects literally and at full face value. In agreeing with its position we do so upon an acceptance of its concern for the certificated carriers and its purpose to protect them. We believe this is required by the general scheme of the statute.

The real controversy, then, upon the present point is not whether the Board may or may not unduly impinge upon the certificated system by use of the exemption power but whether it has in fact done so. Petitioners urge that ten flights per month between any pair of points upon a regularly scheduled basis are an obvious impingement upon the certificated carrier serving those points. The Board did three things in this respect. It found, upon the basis of the evidence, that such impingement would not be likely to occur. It next announced that it would not permit combinations or collusions between the supplemental carriers which might in total adversely affect the certificated carriers. And, thirdly, as we have already said, it announced that if the results proved different from its anticipations it would revise the order to eliminate the adverse effects.

We think we could not superimpose our judgment upon that of the Board upon such an issue, even if we had a judgment different from that of the Board. Experience alone will demonstrate the true answer. The Board's expert opinion is that the system it has devised, with its terms and limitations, will not seriously conflict with the interests of the certificated carriers. And it goes further and says it will insure that such conflict does not ensue.

In sum it seems to us that the judgment of the Board, that an air service supplemental to the certificated services is in the public interest, is a rational judgment and one which we must accept; that the finding of the Board that its proposed supplemental service will not result in

adverse economic effects upon the certificated system is a conclusion which the Board is entitled to draw if the record supports it with evidence; and that the assurance of the Board that it will not hereafter permit adverse economic effects to jeopardize the certificated system or to pose a substantial threat to it, should be accepted and respected by this court. Having reached that point we then conclude that if the Board makes the required findings as to undue burden, its present plan for a supplemental air carriage, effecting no excessive impact upon the certificated system, would be within the statutory exemption power (*i.e.*, Section 416(b)).

The second main point urged by petitioners is that the Board failed to make the findings required by the statute to support the exemption under Section 416(b). That section, as we have already noted, requires that the Board find "that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reasons of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

The exemption here involved is from the enforcement of the provision of the statute requiring certification. The question therefore is whether the requirement of certification would be an undue burden on this class of air carriers by reason of either the limited extent of air operations or unusual circumstances affecting their operations; and whether the requirement that this class of carriers be certified is not in the public interest. We find in the opinion of the Board a statement that "In these circumstances, very little purpose would be served by withholding the enlarged operating authority for what may be a lengthy period, and to do so would constitute an undue burden upon the applicants." But that statement does not support a conclusion that an exemption

rather than a certification should be granted. It supports a conclusion only that some action should be taken promptly. We also find in the order a conclusion stated in the language of the statute, but the order contains no findings to support that conclusion. We have examined the opinion and the order with care, but we cannot ascertain from them what the Board deems to be the limited extent of the operations of the supplemental carriers which would make a certification an undue burden on the carriers, nor can we determine what unusual circumstances affecting the operations of the supplemental carriers would make certification an undue burden on these carriers. Neither can we ascertain why the Board is of opinion that the certification of these supplemental carriers is not in the public interest.

We think the Board must make findings in the foregoing respects in order that the court, in the exercise of its review function, may determine whether the grant of the exemption is within the statutory authority of Section 416(b). It might be that the operating authority granted these carriers should be exempted from the requirement of Section 401(f) that the certificate specify the terminal points between which the carrier is authorized to engage in air transportation, or from the required specification of the service to be rendered. We do not know whether that is what the Board had in mind. But the question before us is not whether the supplemental carriers should be exempted from one or more of the subsidiary requirements of certification but whether they should be exempted from certification altogether. We repeat we cannot ascertain from the opinion or order what undue burden the Board thinks certification would be or why it thinks certification of this supplemental service would not be in the public interest. We are of opinion, therefore, that the case must be remanded in order that the Board may make findings to support the

conclusions which the statute makes necessary to the exercise of the exemption power.

We are conscious of the fact that the operating authority issued under the order before us is an interim authority, to be effective only until the Board has concluded its consideration of the qualifications of the various applicants. If the Board had rested a finding of undue burden upon the fact that the interim for which this operating authority is issued is short, whereas the remainder of a certification proceeding would be long, we would be close to the ruling of this court in the air mail case.[9] But we do not understand the Board to rest upon the temporary feature of the order. The purport of the discussion in the opinion of the Board is that the exemption power may be exercised to accomplish the permanent ends it has in mind for these supplemental carriers and does not depend upon or revolve about the temporary character of the exemption presently authorized.

The Board says no detailed findings are required, referring to the fact that this was a rule-making proceeding and relying upon our opinion in *Eastern Airlines* v. *Civil Aeronautics Board*.[10] But Section 416(b) itself requires that the Board shall find these conditions to exist, and it is clear that in order for the court to determine whether the Board acted within its statutory authority it must know what the Board finds. The *Eastern Airlines* case held only that Section 416(b)(1) does not require notice and full hearing and that the proceedings which occurred in that case were sufficient to comply with the procedural requirements of the statute.

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[9] American Airlines v. Civil Aeronautics Board, — U.S. App. D.C. —, 231 F.2d 483 (D.C.Cir. 1956).

[10] 87 U.S. App. D.C. 331, 185 F.2d 426 (1950), *vacated*, 341 U.S. 901, 95 L.Ed. 1341, 71 S.Ct. 613 (1951).

In its brief the Board points to various subsidiary findings made by the examiners and adopted by the Board which are factual in respect to the supplemental carriers, such as comparisons between the new limitation and the old limitations in the irregular air carrier regulations, the overall financial resources and revenues of these carriers, the history of these carriers, the steady worsening in their position, and similar facts. But there is nothing to indicate upon what facts or findings the Board based its conclusion that a requirement of certification would be an undue burden upon these carriers. The opinion and the order leave us at a complete loss upon that subject.

We fully realize that the irregular carriers have been operating under exemption authority for many years, and it seems possible, if indeed not probable, that the Board has not heretofore stated its conclusions as to undue burden and public interest in any more extensive form than it does now. But until now these carriers have not operated with any semblance of regularity. They were truly irregular carriers, as they were called. Now they are to become supplemental carriers and no longer irregular. They are moved much closer to the certificated services. The burden of certification is no longer obvious. Moreover we are not referred to an adjudication of a challenge to the presence of an undue burden upon the irregular operation. There is now before us for adjudication a challenge to the burden asserted to exist upon supplemental operation. We think that, if the Board can institute a regular supplemental air service without certification and merely by exercising the exemption power, it may not do so without first clearly meeting the statutory prerequisites to the exercise of that power.

The Board demonstrated, as we have indicated in the first part of this opinion, that the supplemental carriers have a place in the national transportation system and that they should be authorized to operate. But the ques-

tion now under consideration is whether they should be authorized by certificates, premised upon public convenience and necessity and specifying in some fashion the service which such carriers will be obligated to perform, or whether their operation may be authorized by a simple exemption from all the certification requirements of the statute. To validate an order of exemption the Board must comply with the statute; *i.e.*, it must find what the statute requires it to find, not in conclusory fashion in the statutory language but in such fashion that a reviewing court can test the validity of the finding.

The petitioners' third main point is that the order finally issued was not within the scope of the proceeding instituted by the Board's initial orders. We agree with the Board upon this point, basing that conclusion upon the view of the order here under review which we have heretofore described in this opinion.

The cases will be remanded for further proceedings.

Judgment

These cases came on to be heard on the record from the Civil Aeronautics Board, and were argued by counsel.

On Consideration Whereof, It is order and adjudged by this Court that the order of the Civil Aeronautics Board on review in these cases be, and the same is hereby, set aside and that these cases be, and the same are hereby, remanded to the said Civil Aeronautics Board for further proceedings consistent with the opinion to this Court.

Dated: July 19, 1956.

Per Curiam.

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No. 779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION,
Petitioner,

v.

AMERICAN AIRLINES, INC., ET AL., and
NATIONAL AIRLINES, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COATES LEAR
Cafritz Building
Washington, D. C.

THEODORE I. SEAMON
Woodward Building
Washington, D. C.
Counsel for Petitioner,
Independent Military Air Transport Association

Dated: February 16, 1957
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION,
Petitioner,

v.

AMERICAN AIRLINES, INC., ET AL., and
NATIONAL AIRLINES, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Independent Military Air Transport Association, respectfully prays that a writ of

certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause.

OPINION BELOW

The Opinion of the Court below (Appendix A, *infra*, pp. 1a-17a) is officially reported at 235 F. 2d 845.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1956. Orders denying petitions for rehearing were entered on September 19, 1956. The jurisdiction of this Court is invoked under 28 USC 1254 (1) and 47 USC 402 (J).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board exceeded its statutory powers under Section 416 (b) of the Act (Civil Aeronautics Act of 1938, as amended, 49 USC 496 (b)) in exempting from the Certificate requirements of Section 401 (49 USC 481) some 49 carriers to perform the air transportation services permitted on an interim basis pending final decision with respect to their applications for Certificates of Public Convenience and Necessity.

2. Whether the Civil Aeronautics Board, in the Opinion and Order under review, made sufficient findings, as a matter of law, to support the conclusion that enforcement of the Certificate requirements of the Act would be an undue burden by reason of the limited extent of or unusual circumstances affecting the operations of the exemptees and not in the public interest.

3. Whether the Court below should have withheld action in the case until Petitioners below demonstrated that they had exhausted their administrative remedies.

STATUTE INVOLVED

The statute involved is the Civil Aeronautics Act of 1938, 52 Stat. 973, *et seq.*, 49 USC 401 *et seq.*, the pertinent provisions of which are set forth in Appendix B, *infra*. Particularly involved is Section 416 (b) (1) of said Act which is set forth in Appendix B at page .

STATEMENT

This Petition seeks review of the judgment of the United States Court of Appeals for the District of Columbia whereby it reversed the Opinion and Order of the Civil Aeronautics Board granting to members of your Petitioner's Association certain enlarged operating rights in air transportation pending final decision with respect to the applications of such members for Certificates of Public Convenience & Necessity.

Your Petitioner is an Association of air carriers composed principally of Supplemental Air Carriers (formerly known as Irregular Air Carriers). The Court below granted your Petitioner leave to intervene in the proceeding by Order dated January 23, 1956.

The proceeding sought to be reviewed by this Honorable Court arose on September 21, 1951 as a result of an Order by the Civil Aeronautics Board instituting a general investigation to determine what place, if any, the so-called Irregular Air Carriers should have in the field of air transportation.

Since the Civil Aeronautics Act became law in 1938, Irregular Air Carriers had been permitted by exemption order of the Civil Aeronautics Board to engage in air transportation on an irregular or "non-scheduled" basis. Although the term "irregular" or "non-scheduled" was never precisely defined by the Civil Aeronautics Board, it was generally conceded that such carriers could operate between 8 and 12 flights per month on an individually ticketed basis under regulations which had been in effect for many years. These flights, however, had to be operated on an irregular or infrequent basis and, indeed, the precise number of flights which a carrier could operate during a given period of time was not known to any of the carriers.

At the end of World War II, numerous war-trained pilots sought to enter the field of air transportation by establishing their own independent airlines. Accordingly, in 1947 the Civil Aeronautics Board revised its exemption regulation (12 Fed. Reg. 3076, 14 CFR 292.1) to require Letters of Registration as a condition precedent to operations and to distinguish between operators of transport-type aircraft (large irregular carriers) and operators of small aircraft (small irregular carriers).[1] 142 large irregular carriers were issued Letters of Registration pursuant to the 1947 regulation.

In 1949 the Civil Aeronautics Board again revised the regulations (14 CFR 291) terminating the blanket exemption authority under the 1947 regulations and

[1] The latter carriers now known as air taxi operators are permitted to engage in unlimited operations on a scheduled basis using aircraft with a gross take-off weight of no more than 12,500 pounds. (i.e., capacity of transporting about 8 passengers) (14 CFR 298).

requiring large irregular carriers to apply for individual exemption authority. 97 of the 142 holders of Letters of Registration issued under the 1947 regulation filed applications for individual exemption authority. These applicants were permitted to continue to operate pending final disposition of their applications for exemption authority (TR. 48585). The Order of the Civil Aeronautics Board of September 21, 1951 consolidated in the proceeding these applications for individual exemption authority together with applications for Certificates of Public Convenience and Necessity filed by the applicants. (TR. 42494, 48586).

The applicants in the proceeding before the Civil Aeronautics Board (known as the *Irregular Air Carrier Investigation*, Docket 5132, *et al.*) for the most part, sought authority to engage in unlimited charter operations plus 14 flights per month between any two points on individually ticketed or waybilled flights. (TR. 48649-48656).

The Petitioners below are holders of Certificates of Public Convenience and Necessity (e.g., American Airlines, Inc.) authorizing unlimited, scheduled air transportation of persons, property and mail over fixed routes. These carriers opposed the continuation of the then-existing rights of the irregular air carriers to engage in individually ticketed or waybilled flights.

After nearly four years of hearings (during which time a record of over 50,000 pages was built) the Civil Aeronautics Board on November 15, 1955 issued its Opinion in the *Large Irregular Air Carrier Investigation*, Docket 5132, *et al.* In this Opinion the Civil Aeronautics Board reclassified the large irregular air

carriers as "Supplemental Air Carriers" and granted to each member of the class the authority to: (1) operate up to ten (10) individually ticketed or way-billed flights per month between the same pair of points without regard to regularity, and (2) engage in an unlimited number of charter flights where the entire capacity of the aircraft is utilized by a single person (except ticket agents, etc.) (TR. 48550, 48552, 48565, 48590, 48591 and 48688). The ten (10) flight authorization was a substitute for the prior authorization whereby there was no precise numerical limitation on flights, but where from 8 to 12 flights could be operated between the same points. The authority to operate charter flights (except with ticket agencies, etc.) was made unlimited whereas under the old regulations, charter flights were counted in determining "regularity".

Throughout its decision, the Civil Aeronautics Board repeatedly emphasized the fact that the authority granted was on a temporary or interim basis pending final decision with reference to the applicants' petitions for Certificates of Public Convenience and Necessity.

The Civil Aeronautics Board unanimously approved the granting of unlimited charter rights to the applicants but the Board split 3 to 2 on the question of whether the applicants should be authorized to operate the 10 individually ticketed flights, the latter having been vigorously opposed by the Petitioners below. The Board also reserved jurisdiction over the case for the purpose of further reducing the number of permissible individually ticketed flights on an expedited basis in the event the 10 flights should prove

unduly competitive with the established services of the certificated air carriers.

The Court below did not consider the record built up in the hearings before the Civil Aeronautics Board but reversed the Board on the grounds that the authority granted the applicants was a permanent authorization and that the Board had not "as a matter of law" made sufficient findings of fact to justify the conclusion that the granting of Certificates of Public Convenience and Necessity to the applicants would be an undue burden because of the limited extent or unusual circumstances surrounding their operations and not in the public interest.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the District of Columbia Circuit had decided an important question of Federal law which has not been, but should be, settled by this Court. Specifically, the decision of the Court below severely restricted the powers heretofore exercised by the Civil Aeronautics Board pursuant to Section 416 (b) (1) of the Act to develop air transportation in the public interest and in the interests of National Defense. The Opinion of the Court below also overrules 18 years' of consistent administrative interpretation of Section 416 (b) (1) by the Civil Aeronautics Board which interpretation has been consistently upheld by the Circuit Courts.

Pursuant to Section 2 of the Civil Aeronautics Act (see Appendix page 17a) it is the duty of the Civil Aeronautics Board to foster the development of air transportation to the maximum possible extent in the public interest and in the interest of National Defense. Since World War II the Board has made extensive

use of its exemption powers in order to foster the development of new or experimental types of air transportation services. Following are a few examples:

A. On May 5, 1947 the Civil Aeronautics Board adopted Section 292.5 of the Economic Regulations which created a class of carriers engaged exclusively in the transportation of air freight and permitted these carriers to engage in unlimited, scheduled cargo operation over all the principal airline routes in the United States until such time as the Board could pass upon their applications for Certificates of Public Convenience and Necessity which were pending at that time. This was the fundamental regulation which brought into being the air freight carriers as a significant part of the air transportation industry. In commenting upon Section 292.5 of the Economic Regulations (later recodified as Part 295) CAB Member Gurney, formerly Chairman of the Civil Aeronautics Board (and one of the dissenting Members herein) testified before the Senate Committee on Interstate and Foreign Commerce on S-2647 as follows:

> "In addition to making provision for supplemental service, the Board has used its exemption authority under Section 416 (b) of the Civil Aeronautics Act of 1938 for development purposes. Thus, as indicated a few moments ago, the authority was used to authorize the initial experiment of the all-freight carriers.
>
> "Part 295 of the Board's Economic Regulations, adopted in 1947, opened the way for experimental scheduled all-freight services by certain noncertificated carriers. After the experience of 2 or 3 years, some of these carriers were duly certificated and now hold certificates of public

convenience and necessity, authorizing them to engage in freight-only operations.

"It is quite probable that had not the services been tested by means of an experimental period, there might not have been sufficient evidence to warrant a finding of public convenience and necessity for this type of operation.

"A second type of experimental authorization under the present Board powers related to an all-expense tour operator. Successful operations, pursuant to an exemption order, led to the subsequent issuance of the certificate of public convenience and necessity."

The Board's decision granting Certificates of Public Convenience and Necessity to a number of these cargo carriers was appealed to the United States Court of Appeals for the District of Columbia Circuit by substantially the same carriers which appealed the instant decision of the Board and substantially the same arguments were advanced to the effect that the Board had disregarded its statutory functions and made inadequate findings or findings not supported by substantial evidence. The Board's opinion was unanimously affirmed by the Circuit Court. *American Airlines, Inc., et al.* v. *Civil Aeronautics Board,* 192 F. 2d 417 (1951).

The instant proceeding is exactly parallel to the case which gave birth to the air freight carriers. In the instant proceeding the Board found that the irregular (Supplemental) air carriers might reasonably suffer severe financial reverses under the then-existing regulations; that these carriers had made substantial contributions to air transportation (particularly in providing low cost "coach service" and

contract operations for the Military Establishment) and that such carriers should be preserved as an operating group in the public interest and in the interest of National Defense pending final determination of their applications for Certificates of Public Convenience and Necessity. For all practical purposes, the same findings were made with reference to the air freight carriers and, as pointed out by Member Gurney, "it is quite probable that, had not the services been tested by means of an experimental period, there might not have been sufficient evidence to warrant a finding of public convenience and necessity for this type of operation."

B. On July 1, 1949, the Board adopted Section 292.6 (now Part 296) of the Economic Regulations and thereby established a classification of indirect air carriers known as air freight forwarders. These carriers, like the freight carriers, were exempted from most of the provisions of Title IV of the Civil Aeronautics Act, including the Certificate provisions of Section 401 (a). This decision by the Board, like the *Air Freight Case,* was appealed by substantially the same carriers and the principal contention was again that the Board had exceeded its statutory authority. The Board's opinion was unanimously affirmed by the United States Court of Appeals for the Seventh Circuit. *American Airlines, Inc., et al.* v. *C. A. B.,* 178 F. 2d 903 (1949).

C. On April 24, 1950, the Board adopted Part 297 of the Economic Regulations (15 FR 1866) and thereby created a class of carriers known as international air freight forwarders, which, like the domestic air freight forwarders, were granted exemp-

tion from most of the provisions of Title IV of the Act including the Certificate provisions of Section 401 (a).

D. On February 20, 1952, the Board adopted Part 298 of the Economic Regulations (17 FR 635) and thereby created a classification of air carriers known as air taxi operators. These carriers, like the air freight carriers and the air freight forwarders, were granted exemption from most of the provisions of Title IV including the Certificate requirements of Section 401 (a).

E. The use by the Board of its exemption powers under Section 416 (b) for the development of air transportation has by no means been limited to the period since World War II. Thus, as early as December 7, 1938, the Board adopted Regulation 400-1 which created the non-scheduled air carriers and exempted them from the provisions of Section 401 and practically all the other provisions of Title IV. In 1938 and 1939 the Board granted exemptions from the provisions of Section 401 (a) of the Act to a number of carriers and thereby authorized them to engage in unlimited scheduled operations in air transportation of mail, passengers and property over a number of specific routes over which the statute required the discontinuance of service pending granting of Certificates.

Pennsylvania Central Airline Corporation was authorized by exemption from the provisions of Section 401 (a) to render air transportation service "over the route between Detroit, Michigan and Sault Ste. Marie, Michigan via intermediate cities" for all classes of traffic for which authorization was sought until an application for certificate filed by such carrier could be acted on. This exemption covered a period from

June 23, 1938 to and including 120 days thereafter and beyond the 120-day period, provided only that application for certificate was filed within a period of 120 days after June 23, 1938.[2]

National Airlines was similarly authorized to engage in air transportation of mail in addition to persons and property "over the route between Jacksonville, Florida and New Orleans, Louisiana via Tallahassee, Marianna, Pensacola, Florida, Mobile, Alabama and Gulfport, Mississippi", pending action on its application for certificate authorization to serve that route.[3]

Eastern Air Lines was granted similar exemption authorizations with respect to transportation of mail, persons and property "over a route from Tampa, Florida, to Tallahassee, Florida, and from Tallahassee, Florida to Memphis, Tennessee" via intermediate points and from Tallahassee, Florida to Atlanta, Georgia via Albany, Georgia; and "over a route from Houston, Texas to Brownsville, Texas and from Houston, Texas to San Antonio, Texas."[4] As the Board stated in its Opinion granting Eastern its grandfather certificate:

> "On and before that date (June 23, 1938) the applicant was not engaged in air transportation to any point on air mail routes Nos. 40 and 42.

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[2] Special Order 401-A-1; Pennsylvania Central was awarded a Post Office contract for this route on June 25, 1938 and its operations were not instituted until July 20, 1938. The statutory provisions of Section 401 (a) of the Act would have required the discontinuance of service on August 22, 1938 in the absence of the foregoing exemption authorization. 1 CAA 66, 70 (1939).

[3] Special Order 401-A-6.

[4] Special Order 401-A-7 and Special Order 401-A-8.

Therefore, applicant was prohibited by the act from engaging in air transportation on such routes until certificates authorizing such transportation should be issued. In order to enable the applicant to commence operations on these routes prior to the issuance of any certificates for the routes, the Authority, pursuant to the provisions of Section 416 (b) of the Act, on October 10, 1938, promulgated Special Order 401-A-7 and Special Order 401-A-8 exempting applicant from the provisions of Section 401 (a) of the Act with respect to the commencement of operation on air mail routes Nos. 40 and 42, respectively, until such time as the Authority shall issue certificates of public convenience and necessity for the air transportation service over such routes of applicant, or shall issue its final order denying the application of the applicant for such certificates.'[5] (Emphasis supplied).

Braniff was given similar exemption authorization over a route between Dallas, Texas and San Antonio, Texas via Waco and Austin.[6]

In none of the above cases did the Board ever make any findings as extensive as those which were made in the instant proceeding. Indeed, in the great majority of the above cases, the Board simply recited the statutory findings required by Section 416 (b) (1) without any discussion of the subsidiary reasons for the granting of the exemption orders. In striking contrast to practically all of the above proceedings, the Board in the instant case made the following principal findings:

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[5] 1 CAA 173, 179 (1939).

[6] Special Order 401-A-9.

1. That the granting of the exception order was necessary in order to preserve the carriers in the public interest (Tr. 48540, 48541, 48550, 48558, 48630, 49199, and 49204).

2. That the preservation of the carriers is important in the interests of national defense (Tr. 48541, 48550).

3. That the carriers had experienced a steady worsening in position in terms of dwindling revenues, resources, and number of carriers under previous regulations and that more liberal regulations were necessary to preserve the carriers (Tr. 48536, 48585, 48598-99, 49198, and 49199).

4. That the carriers are small in relation to overall financial resources and revenues derived by the entire aviation industry (Tr. 4865-77).

5. That the authority granted the small carriers would not have any serious adverse competitive impact upon the large certificated airlines (Tr. 48551, 48554, 48555, 48557, 48558, 49202, 49203).

6. That the ability of the carriers to operate their aircraft in the interest of national defense depends in large measure upon their commercial activities (Tr. 48541, 48550).

7. That insufficient coach service has been provided by the large certificated carriers and the existence of the small carriers is necessary to accommodate peak traffic demands (Tr. 48634, 48683-85, 49201).

8. That the carriers have been forced to operate under serious competitive disadvantages (Tr. 48626, 48634).

9. That there is a public need for the services of the carriers in order to develop new and different services and demands (Tr. 49196-97, 49203-04).

The above are merely a few of the more important subsidiary findings. In addition, the Board, of course, made the statutory finding required by Section 416 of the Civil Aeronautics Act to the effect that the enforcement of the certificate provisions contained in Section 401(a) of the Act would be an undue burden upon the carriers by reason of the limited extent of or unusual circumstances affecting their operations and would not be in the public interest.

F. The large certificated air carriers (the petitioners below) did not either in the United States Court of Appeals or before the Board raise any serious objections to the authority granted the supplemental carriers to engage in unlimited charter operations. The petitioners below did, however, object to the authority granted the supplemental carriers to operate up to 10 (ten) trips per month on an individually ticketed or individually waybilled basis.

Admittedly it was impossible for the Board to forecast with mathematical exactness what competitive impact, if any, the 10-flight per month authorization would have upon the certificated airline industry. This is a matter about which reasonable persons may disagree, as witnessed by the fact that the Board itself was split three to two on the issue. The Board, therefore, specifically retained jurisdiction in the case for the purpose of further limiting the number of permissible individually ticketed flights in the event that practical experience showed that the 10-flight limitation should prove unduly competitive upon the certificated airlines. The Board stated:

> "If in actual practice it should develop that the amount of service offered under the 10-flight provision proves excessive in terms of its impact upon

> the certificated route structure, we should be free to make the necessary adjustments to that provision and to do so promptly. For that reason, we are expressly reserving the power to make downward adjustments in the 10-flight provision and to do so on an expedited basis if circumstances so require."

The law is well settled that where a Government agency has authority to pass upon the question raised by a petitioner in a judicial proceeding and the agency is able to modify the order under attack, the Court should withhold its aid entirely until administrative remedies have been exhausted. *Natural Gas Pipe Line Co.* v. *Slattery,* 302 U.S. 300, 82 L. ed. 276, 58 S. Ct. 199. The Court below, however, refused to pass upon this important question and, indeed, made no mention thereof in its opinion.

CONCLUSION

The Court below has decided an important question of administrative law which has not but should be passed upon by this Honorable Court. Specifically, the Court below has ruled that pursuant to Section 416(b) of the Civil Aeronautics Act, the Civil Aeronautics Board has no authority to grant supplemental operating rights to a number of small airlines whose existence the Board has found to be essential in the public interest and in the interests of national defense. Moreover, the opinion of the Court below overrules eighteen years of administrative interpretation of Section 416(b) of the Civil Aeronautics Act, which interpretation has consistently been upheld by the various circuit courts but has not yet been passed upon by this Court. The findings of the Civil Aeronautics Board in the case are set forth in detail in an elaborate

opinion and supplemental opinion on reconsideration. The detailed findings of the Board are, in turn, supported by a record totalling over 50,000 pages, which has been built up during proceedings lasting nearly four years. If the opinion of the Court below is not reversed, there is grave danger that the supplemental air carriers which have made substantial contributions to air transportation and to the interests of national defense will cease to exist.

WHEREFORE, it is respectfully prayed that this Honorable Court issue a Writ of Certiorari to the Court below.

Respectfully submitted,

COATES LEAR
Cafritz Building
Washington, D. C.

THEODORE I. SEAMON
Woodward Building
Washington, D. C.
Counsel for ~~Intervenor~~ Petitioner,
Independent Military Air Transport Association

Dated: February 16, 1957

Proof of Service

I, Coates Lear, one of the attorneys for the Independent Military Air Transport Association, Intervenor herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on February 16, 1957, I served a copy of the foregoing Petition for Writ of Certiorari upon the persons listed below by mailing copies, in duly addressed envelopes, with first class postage prepaid, as follows:

Honorable Herbert J. Brownell
Attorney General of the United States
Department of Justice
Washington, D. C.

Mr. Daniel M. Friedman
Attorney
Department of Justice
Washington, D. C.

Mr. Franklin M. Stone
General Counsel
Civil Aeronautics Board
Washington, D. C.

John T. Lorch, Esq.
231 South LaSalle Street
Chicago 4, Illinois

James Francis Reilly, Esq.
1625 K Street, N. W.
Washington 6, D. C.
Attorneys for United Air Lines, Inc.

Charles H. Murchison, Esq.
1016 Ring Building
Washington 6, D. C.
Attorney for Capital Airlines, Inc.

Hubert A. Schneider, Esq.
815 Fifteenth Street, N. W.
Washington 5, D. C.
Attorney for Braniff Airways, Inc.

Gerald P. O'Grady, Esq.
1625 Eye Street, N. W.
Washington 6, D. C.
Attorney for Pacific Northern Airlines, Inc.

Amos M. Mathews, Esq.
208 Union Station Building
Chicago 6, Illinois
Attorney for Abilene & Southern Railway Co., et al.

Richard A. Fitzgerald, Esq.
920 Southern Building
Washington 5, D. C.
Attorney for National Airlines, Inc., Intervenor

Albert F. Beitel, Esq.
905 American Security Building
Washington 5, D. C.
Attorney for Aircoach Transport Association and Quaker City Airways, Inc., Intervenors

Mr. O. D. Ozment
Chief, Litigation and Research Division
Civil Aeronautics Board
Washington 25, D. C.

COATES LEAR
Attorney for Independent Military Air Transport Association, Intervenor
605 Cafritz Building
Washington 6, D. C.

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13044

AMERICAN AIRLINES, INC., PETITIONER
NATIONAL AIRLINES, INC., INTERVENOR

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CAPITOL AIRWAYS, INC., QUAKER CITY AIRWAYS, INC.,
AIRCOACH TRANSPORT ASSOCIATION, and INDEPENDENT
MILITARY AIR TRANSPORT ASSOCIATION, INTERVENORS

No. 13045

TRANS WORLD AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13048

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13052

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13054

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13061

UNITED AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13063

CONTINENTAL AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13064

NORTHWEST AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13068

ALLEGHENY AIRLINES, INC., et al., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13116

WESTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13117

CAPITAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13118

BRANIFF AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13120

PACIFIC NORTHERN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13121

ABILENE & SOUTHERN RAILWAY COMPANY, et al., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

On Petitions for Review of Order of the Civil Aeronautics Board

Decided July 19, 1956

Mr. Howard C. Westwood, with whom *Mr. Clifton J. Stratton, Jr.,* was on the brief for petitioner in No. 13044, argued for all petitioners and for intervenor National Airlines, Inc., in No. 13044. *Mr. Richard A. Fitzgerald* was on the brief for intervenor National Airlines, Inc., in No. 13044.

Mr. John F. Floberg for petitioners in No. 13068. *Mr. Edward DeGrazia* also entered an appearance for petitioners in No. 13068.

Mr. J. D. Feeney, Jr., with whom *Messrs. Amos M. Mathews* and *Thormund A. Miller* were on the brief, for petitioners in No. 13121.

Mr. James K. Crimmins was on the brief for petitioner in No. 13045. *Mr. William Caverly* also entered an appearance for petitioner in No. 13045. *Mr. W. Glen Harlan* was on the brief for petitioner in No. 13048. *Messrs. Henry J. Friendly, Robert C. Barnard* and *Leon Lipson* were on the brief for petitioner in No. 13052. *Messrs. L. Welch Pogue* and *James F. Bell* were on the brief for petitioner in No. 13054. *Mr. Robert L. Stern* was on the brief for petitioner in No. 13061. *Mr. James Francis Reilly* entered an appearance for petitioner in No. 13061. *Messrs. C. Edward Leasure* and *Herman F. Scheurer, Jr.,* were on the brief for petitioners in Nos. 13063 and 13064. *Messrs. L. Welch Pogue* and *James W. Callison* were on the brief for petitioner in No. 13116. *Messrs. Robert B. Hankins* and *Macon M. Arthur* were on the brief for petitioner in No. 13117. *Messrs. Hubert A. Schneider* and *B. Howell Hill* were on the brief for petitioner in No. 13118. *Mr. Gerald P. O'Grady* was on the brief for petitioner in No. 13120.

Mr. O. D. Ozment, Chief, Litigation and Research Division, Civil Aeronautics Board, with whom *Mr. Franklin M. Stone,* General Counsel, Civil Aeronautics Board, *Mr. John H. Wanner,* Associate General Counsel, Civil Aeronautics Board, *Messrs. Robert L. Park, Gerald F. Krassa* and *Henry M. Switkay,* Attorneys, Civil Aeronautics Board, and *Mr. Daniel M. Friedman,* Attorney, Department of Justice, were on the brief, for respondent.

Mr. Albert F. Beitel, with whom *Mr. John H. Pratt* was on the brief, for intervenor Aircoach Transport Association, in No. 13044. *Messrs. Albert F. Beitel* and *John H. Pratt* entered appearances for intervenor Quaker City Airways, Inc., in No. 13044.

Mr. Coates Lear, with whom *Mr. Theodore I. Seamon* was on the brief, for intervenor Independent Military Air Transport Association, in No. 13044. *Messrs. Coates Lear and Theodore I. Seamon* entered appearances for intervenor Capitol Airways, Inc., in No. 13044.

Before PRETTYMAN, WILBUR K. MILLER, and FAHY, Circuit Judges.

PRETTYMAN, *Circuit Judge:* These are petitions to review an order of the Civil Aeronautics Board.[1] This order is the latest in a long series dealing with the problem of the non-scheduled or irregular air carriers. Petitioners are the certificated air carriers and certain railroads. The intervenors in behalf of the respondent are associations of irregular carriers. The respondent, of course, is the Civil Aeronautics Board. It is unnecessary to recite here the background of the present controversy. It appears in its various stages in a long line of cases before this court and before the Board.[2]

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[1] Order E-9744. Technically, a subsequent order, E-9884, denying reconsideration of the first order, is also involved.

[2] See, *e.g.,* Air Transport Associates v. Civil Aeronautics Board, 91 U.S. App. D.C. 147, 199 F.2d 181 (1952), *cert. denied,* 344 U.S. 922, 97 L.Ed. 710, 73 S.Ct. 386 (1953); American Air Transport

The basic requirement heretofore imposed upon the irregular carriers by the Board has been that they operate without any reasonable semblance of regularity as to schedule or route. The basic change wrought by the present order is to remove this requirement of irregularity and to substitute in its place a maximum limitation upon the number of round trips permitted per month between any two points. The Board accomplishes this objective by granting these carriers an exemption under Section 416(b) of the Act.[3] The petitioners contest the validity of the order, so far as the present argument is concerned,[4] upon three basic grounds: (1) that the Act grants the Board no power to issue such an order; (2) that the order is not supported by the findings required by the statute; and (3) that the order is beyond the scope of the proceeding.

In 1951 the Board instituted a proceeding to determine its future policy with regard to Large Irregular Air Carriers.[5] Some sixty-six applicants were involved. Two examiners began hearings, in which not only the general problem was involved but the individual qualifications of the several applicants were treated as issues. Testimony as to about half of the applicants had been

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v. Civil Aeronautics Board, 92 U.S. App. D.C. 117, 206 F.2d 423 (1953); Eastern Airlines v. Civil Aeronautics Board, 87 U.S. App. D.C. 331, 185 F.2d 426 (1950), *vacated*, 341 U.S. 901, 95 L.Ed. 1341, 71 S.Ct. 613 (1951); New England Air Express v. Civil Aeronautics Board, 90 U.S. App. D.C. 215, 194 F.2d 894 (1952); Large Irregular Carriers, Exemptions, 11 C.A.B. 609 (1950).

[3] 52 STAT. 1004 (1938), as amended, 49 U.S.C.A. § 496(b).

[4] The petitions for review presented, generally speaking, issues of law and also issues requiring examination of the evidentiary record. This record totaled fifty thousand pages. By a prehearing order under Rule 38(k) of the Rules of this Court, the court ordered that the issues of law be briefed, argued and decided and that pending such disposition the evidentiary issues be reserved.

[5] The proceeding was known as The Large Irregular Air Carrier Investigation, Docket No. 5132.

presented when the Board deferred further hearing on such qualifications and directed that the proceeding go forward upon the general questions. The examiners presented an initial decision. Exceptions to it were filed, and oral argument was held before the Board. A majority rendered a long opinion and an order. Two members dissented. In the order the Board recited that the enforcement of the certification provisions of the Act (Sections 401(a),[6] 404(a)[7] and 405(e)[8]) would be an undue burden on the carriers by reason of the limited extent of, and the unusual circumstances affecting, the operations of such carriers. It ordered that forty-nine of the applicants (naming them) be temporarily exempted from the certification requirements, subject to certain terms, and that each be issued an "Interim Operating Authorization" to terminate sixty days after the Board should dispose of the several individual applications for exemption authority. The terms attached to the order were long and in some detail. The principal one was that the carrier not engage in more than ten flights in the same direction between any single pair of points in any calendar month. In respect to this condition the Board said in its order:

> "Whenever, in the judgment of the Board, there is reason to believe that the foregoing ten flight limitation is insufficient to confine the operations of supplemental air carriers as a class to the rendition of the supplemental services for which they are authorized, and that the operations of such carriers pose a substantial threat to the stability and soundness of the certificated air carrier system, the Board may at any time reopen the proceeding and, after notice and opportunity for argument and with or without additional evidentiary hearing, make such downward adjustments in the maximum flight limita-

[6] 52 STAT. 987 (1938), as amended, 49 U.S.C.A. § 481(a).

[7] 52 STAT. 993 (1938), as amended, 49 U.S.C.A. § 484(a).

[8] 52 STAT. 995 (1938), as amended, 49 U.S.C.A. § 485(e).

> tion as the Board may deem necessary or desirable. The interim operating authorizations granted by this order are herein expressly conditioned upon and subject to the reserved right of the Board to make further limitations, restrictions or modifications of the ten flight limitation, including a reduction in the number of such flights, to insure that the services remain supplemental."

The opinion of the Board makes clear that the ten flights per month may be conducted upon the basis of a regular schedule. The opinion also makes clear that the Board contemplated that these air carriers could offer unlimited charter operations on a plane-load basis in domestic carriage.

The reasoning of the Board may be summarized. It found that the services performed by the irregular carriers, including charter operations, individually ticketed coach flights, specialized services, and military air-lift, have proven of importance to both the irregular carriers and the public, meeting real needs. It concluded that its policy should be directed toward their survival and healthy growth. It determined that the services rendered by the irregular carriers could not be rendered satisfactorily by the presently certificated carriers, which have fixed commitments to route and schedule operation. It found that the elimination of the restriction against regularity would help the public and strengthen the supplemental carriers, and that it would aid in the administration and enforcement of regulations. The Board emphasized that it selected the number ten as the number of permissible trips by taking into account on an average basis the number of permissible trips which might be operated by these carriers under heretofore existing regulations.

The Board turned its particular attention to the suggestion that the new scope of supplemental operations would open the door to unlimited competition which would affect adversely the certificated carriers. It held

that the hard facts of economic realism would operate against such a situation, reciting in detail the considerations which led to this conclusion. It said it would not permit the supplemental carriers to combine and integrate their operations. It said it would "underscore for all concerned" that the supplemental carriers are to be restricted to needs they are designed to meet and that if they posed a threat to the certificated system "they must face up to a prompt and effective diminution in the maximum permissible flight frequencies."

The Board made a comparatively brief recital in respect to the undue burden upon the applicants and the unusual circumstances affecting their operations, a matter which we shall discuss in detail hereinafter. The Board reserved decision as to the nature and form of the authority to be granted for the supplemental air transportation it contemplated until the completion of the hearings upon the qualifications of the individual applicants, in the meantime issuing temporary authorization.

Petitioners vigorously attack the order upon the ground that it is not authorized by the statute. Section 416(b)(1) reads as follows:

> "The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

It is clear that the foregoing provision has two basic parts. In the first place, in broad language, it empowers

the Board to exempt any class of carriers from "any provision" of the statute or "any rule, regulation, term, condition, or limitation prescribed thereunder." This is sweeping language. The second basic provision in the paragraph is that in order to exert this broad power of exemption the Board must find that enforcement of the statutory provision is or would be "an undue burden" on the class of carriers by reason of the limited extent of, or unusual circumstances affecting, the operation of such carriers. The Board must further find that enforcement of the provision is not in the public interest.

This first point of petitioners is that the Board has no authority to issue this order as an exemption order with or without findings such as the ones described in the last clause of the quoted section. They say the order, in and of itself, is outside the scope of the quoted exemption section. The order, they say, represents something the Board cannot do by exemption. Although, as will develop, we think another contention dispositive of this proceeding, a ruling upon that other contention alone would leave the controversy in a wholly unsettled state. The parties have briefed and argued the point now before us, and we shall dispose of it. To treat it we must assume *arguendo* that valid findings as to undue burden and public interest are made.

The petitioners urge that the basic concept of the statute enacted by the Congress for the regulation of the air industry is of a certificated system. Section 401(a) specifically requires that no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board. Various subsections, notably, *inter alia*, (d), (f) and (k) of Section 401, make provisions respecting certificates and certificated carriers. Petitioners say Congress did not intend that the Board might, by the use of the exemption provision of Section 416(b), destroy the elaborate basic requirements of the Act for a certificated system of airplane carriage. The

petitioners are quite correct in that contion. Despite the broad language of Section 416(b) we ink it is perfectly clear that the Congress did not set so elaborate a series of provisions in respect to the rtification of carriers, and the public interest, convenie and necessity therein involved, and at the some tingrant its administrative agency power to destroy se elaborate provisions. We think there is and must a boundary to the authority of the Board under its emption power to impinge upon the certificated service.

But the Board does not disagree withhe foregoing. Its position is that a sound national tranportation system requires, from the standpoints bothf the normal traveling public and of the national defse, a service supplemental to that which is and can rendered by carriers certificated to routes, schedules d services. It declares that the proposed supplementarriage must not in the aggregate jeopardize the cerficated carrier system. It says that the main and basitransportation system must be a certificated system but at in addition there must be a supplemental service. Inot only thus declares its position but, as we have sn, it inserted both in its opinion and in its order a scific provision that, if experience should show that t supplemental operation poses a substantial threat tohe certificated system, adjustments will be made to prent that result. The position of the Board is a rationame. There is undoubtedly a demand for charter servi and for extra ticketed service in times of peak demanc If there is to be supplemental service rendered, it see rational that supplemental carriers, devoted entirely toat task, should be authorized to operate. We accept e declarations of the Board in these respects literly and at full face value. In agreeing with its positiowe do so upon an acceptance of its concern for the cefficated carriers and its purpose to protect them. We beve this is required by the general scheme of the stat.

The real controversy, then, upon the present point is not whether the Board may or may not unduly impinge upon the certificated system by use of the exemption power but whether it has in fact done so. Petitioners urge that ten flights per month between any pair of points upon a regularly scheduled basis are an obvious impingement upon the certificated carrier serving those points. The Board did three things in this respect. It found, upon the basis of the evidence, that such impingement would not be likely to occur. It next announced that it would not permit combinations or collusions between the supplemental carriers which might in total adversely affect the certificated carriers. And, thirdly, as we have already said, it announced that if the results proved different from its anticipations it would revise the order to eliminate the adverse effects.

We think we could not superimpose our judgment upon that of the Board upon such an issue, even if we had a judgment different from that of the Board. Experience alone will demonstrate the true answer. The Board's expert opinion is that the system it has devised, with its terms and limitations, will not seriously conflict with the interests of the certificated carriers. And it goes further and says it will insure that such conflict does not ensue.

In sum it seems to us that the judgment of the Board, that an air service supplemental to the certificated services is in the public interest, is a rational judgment and one which we must accept; that the finding of the Board that its proposed supplemental service will not result in adverse economic effects upon the certificated system is a conclusion which the Board is entitled to draw if the record supports it with evidence; and that the assurance of the Board that it will not hereafter permit adverse economic effects to jeopardize the certificated system or to pose a substantial threat to it, should be accepted and respected by this court. Having reached that point we then conclude that if the Board makes the required find-

ings as to undue burden, its present plan for a supplemental air carriage, affecting no excessive impact upon the certificated system, would be within the statutory exemption power (*i.e.*, Section 416(b)).

The second main point urged by petitioners is that the Board failed to make the findings required by the statute to support the exemption under Section 416(b). That section, as we have already noted, requires that the Board find "that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reasons of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

The exemption here involved is from the enforcement of the provision of the statute requiring certification. The question therefore is whether the requirement of certification would be an undue burden on this class of air carriers by reason of either the limited extent of air operations or unusual circumstances affecting their operations; and whether the requirement that this class of carriers be certified is not in the public interest. We find in the opinion of the Board a statement that "In these circumstances, very little purpose would be served by withholding the enlarged operating authority for what may be a lengthy period, and to do so would constitute an undue burden upon the applicants." But that statement does not support a conclusion that an exemption rather than a certification should be granted. It supports a conclusion only that some action should be taken promptly. We also find in the order a conclusion stated in the language of the statute, but the order contains no findings to support that conclusion. We have examined the opinion and the order with care, but we cannot ascertain from them what the Board deems to be the limited extent of the operations of the supplemental carriers

which would make a certification an undue burden on the carriers, nor can we determine what unusual circumstances affecting the operations of the supplemental carriers would make certification an undue burden on these carriers. Neither can we ascertain why the Board is of opinion that the certification of these supplemental carriers is not in the public interest.

We think the Board must make findings in the foregoing respects in order that the court, in the exercise of its review function, may determine whether the grant of the exemption is within the statutory authority of Section 416(b). It might be that the operating authority granted these carriers should be exempted from the requirement of Section 401(f) that the certificate specify the terminal points between which the carrier is authorized to engage in air transportation, or from the required specification of the service to be rendered. We do not know whether that is what the Board had in mind. But the question before us is not whether the supplemental carriers should be exempted from one or more of the subsidiary requirements of certification but whether they should be exempted from certification altogether. We repeat we cannot ascertain from the opinion or order what undue burden the Board thinks certification would be or why it thinks certification of this supplemental service would not be in the public interest. We are of opinion, therefore, that the case must be remanded in order that the Board may make findings to support the conclusions which the statute makes necessary to the exercise of the exemption power.

We are conscious of the fact that the operating authority issued under the order before us is an interim authority, to be effective only until the Board has concluded its consideration of the qualifications of the various applicants. If the Board had rested a finding of undue burden upon the fact that the interim for which this operating authority is issued is short, whereas the

remainder of a certification proceeding would be long, we would be close to the ruling of this court in the air mail case.[9] But we do not understand the Board to rest upon the temporary feature of the order. The purport of the discussion in the opinion of the Board is that the exemption power may be exercised to accomplish the permanent ends it has in mind for these supplemental carriers and does not depend upon or revolve about the temporary character of the exemption presently authorized.

The Board says no detailed findings are required, referring to the fact that this was a rule-making proceeding and relying upon our opinion in *Eastern Airlines* v. *Civil Aeronautics Board*.[10] But Section 416(b) itself requires that the Board shall find these conditions to exist, and it is clear that in order for the court to determine whether the Board acted within its statutory authority it must know what the Board finds. The *Eastern Airlines* case held only that Section 416(b)(1) does not require notice and full hearing and that the proceedings which occurred in that case were sufficient to comply with the procedural requirements of the statute.

In its brief the Board points to various subsidiary findings made by the examiners and adopted by the Board which are factual in respect to the supplemental carriers, such as comparisons between the new limitation and the old limitations in the irregular air carrier regulations, the overall financial resources and revenues of these carriers, the history of these carriers, the steady worsening in their position, and similar facts. But there is nothing to indicate upon what facts or findings the Board based its conclusion that a requirement of certification would be an undue burden upon these carriers.

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[9] American Airlines v. Civil Aeronautics Board, — U.S. App. D.C. —, 231 F.2d 483 (D.C.Cir. 1956).

[10] 87 U.S. App. D.C. 331, 185 F.2d 426 (1950), *vacated*, 341 U.S. 901, 95 L.Ed. 1341, 71 S.Ct. 613 (1951).

The opinion and the order leave us at a complete loss upon that subject.

We fully realize that the irregular carriers have been operating under exemption authority for many years, and it seems possible, if indeed not probable, that the Board has not heretofore stated its conclusions as to undue burden and public interest in any more extensive form that it does now. But until now these carriers have not operated with any semblance of regularity. They were truly irregular carriers, as they were called. Now they are to become supplemental carriers and no longer irregular. They are moved much closer to the certificated services. The burden of certification is no longer obvious. Moreover we are not referred to an adjudication of a challenge to the presence of an undue burden upon the irregular operation. There is now before us for adjudication a challenge to the burden asserted to exist upon supplemental operation. We think that, if the Board can institute a regular supplemental air service without certification and merely by exercising the exemption power, it may not do so without first clearly meeting the statutory prerequisites to the exercise of that power.

The Board demonstrated, as we have indicated in the first part of this opinion, that the supplemental carriers have a place in the national transportation system and that they should be authorized to operate. But the question now under consideration is whether they should be authorized by certificates, premised upon public convenience and necessity and specifying in some fashion the service which such carriers will be obligated to perform, or whether their operation may be authorized by a simple exemption from all the certification requirements of the statute. To validate an order of exemption the Board must comply with the statute; *i.e.*, it must find what the statute requires it to find, not in conclusory fashion in the statutory language but in such fashion that a reviewing court can test the validity of the finding.

The petitioners' third main point is that the order finally issued was not within the scope of the proceeding instituted by the Board's initial orders. We agree with the Board upon this point, basing that conclusion upon the view of the order here under review which we have heretofore described in this opinion.

The cases will be remanded for further proceedings.

APPENDIX B

The relevant provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended (49 U.S.C. 401 *et seq.*), are:

* * * * *

Declaration of Policy

Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

* * * * *

TITLE IV—AIR CARRIER ECONOMIC REGULATION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

SEC. 401 (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation: *Provided*, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority [Board] shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

* * * * *

Terms and Conditions of Certificate

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment

thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designated the terminal and intermediate points only insofar as the Authority [Board] shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accomodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency under regulations which may be prescribed by the Authority [Board], between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Authority [Board].

* * * * *

CLASSIFICATION AND EXEMPTION OF CARRIERS

Classification

SEC. 416 (a) The authority [Board] may from time to time establish such just and reasonable classifications of groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable

rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Authority [Board] finds necessary in the public interest.

Exemptions

(b) (1) The Authority [Board], from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Authority [Board] shall not exempt any air carrier from any provision of subsection (1) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Authority [Board] finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operation of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided,* That nothing in this subsection shall be deemed to authorize

the Authority [Board] to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or co-pilots.

* * * * *

JUDICIAL REVIEW OF AUTHORITY'S [BOARD'S] ORDERS

Orders of Authority [Board] Subject to Review

SEC. 1006 (a) Any order, affirmative or negative, issued by the Authority [Board] under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

Findings of Fact by Authority [Board] Conclusive

(e) The findings of facts by the Authority [Board], is supported by substantial evidence, shall be conclusive. No objection to an order of the Authority [Board] shall be considered by the court unless such objection shall have been urged before the Authority [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

FILED
FEB 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 778 & 779

AIRCOACH TRANSPORT ASSOCIATION, INC.,
QUAKER CITY AIRWAYS, INC.,
Petitioners,

v.

AMERICAN AIRLINES, INC., ET AL.,
NATIONAL AIRLINES, INC., ET AL.,
Respondents.

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION,
Petitioner,

v.

AMERICAN AIRLINES, INC., ET AL., and
NATIONAL AIRLINES, INC., ET AL.,
Respondents.

MOTION TO DEFER CONSIDERATION OF PETITIONS FOR WRITS OF CERTIORARI

ALBERT F. BEITEL
JOHN H. PRATT
905 American Security Bldg.
Washington 5, D. C.
Counsel for Petitioners in No. 778

COATES LEAR
Cafritz Building
Washington, D. C.

THEODORE I. SEAMON
Woodward Building
Washington, D. C.
Counsel for Petitioner in No. 779

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 778 & 779

AIRCOACH TRANSPORT ASSOCIATION, INC.,
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v.

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NATIONAL AIRLINES, INC., ET AL.,
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v.

AMERICAN AIRLINES, INC., ET AL., and
NATIONAL AIRLINES, INC., ET AL.,
Respondents.

MOTION TO DEFER CONSIDERATION OF PETITIONS FOR WRITS OF CERTIORARI

To the Honorable The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Come now the Aircoach Transport Association, Inc., and the Independent Military Air Transport Associa-

tion (hereinafter called Petitioners) by their attorneys and respectfully move this Honorable Court to defer consideration of the Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed herein February 16, 1957, until sixty (60) days after the final decision of the Civil Aeronautics Board in the *Large Irregular Air Carrier Investigation,* C.A.B. Docket No. 5132 *et al.,* (the date on which any authorization issued in such *Investigation* would normally take effect) and in support of said Motion respectfully state as follows:

I

The questions presented to this Honorable Court in the Petitions for Writs of Certiorari, filed herein February 16, 1957, arose as a result of an opinion and order of the Civil Aeronautics Board, dated November 15, 1955, in the *Large Irregular Air Carrier Investigation,* C.A.B. Docket No. 5132 *et al.,* wherein the Civil Aeronautics Board granted certain enlarged operating rights to air carriers which are members of your Petitioners' Associations.

II

The opinion of the United States Court of Appeals for the District of Columbia Circuit entered on July 19, 1956, reversed the opinion and order of the Civil Aeronautics Board and remanded the case to the Board for further proceedings. Specifically, the Court of Appeals held, among other things, that the Civil Aeronautics Board should make additional findings of fact to support its opinion and order in C.A.B. Docket No. 5132 *et al.*

III

The opinion and order of the Civil Aeronautics Board, dated November 15, 1955, granted the members of your Petitioners' Associations *interim* operating authority pending final decision by the Board with respect to applications for Certificates of Public Convenience and Necessity or for exemption orders filed by members of your Petitioners' Associations in C.A.B. Docket No. 5132 *et al.* On December 12, 1956, the Civil Aeronautics Board (Respondent below) filed in the United States Court of Appeals for the District of Columbia Circuit a motion to stay the issuance of the opinion and certified copy of judgment of the Court of Appeals until sixty (60) days after the final decision of the Civil Aeronautics Board in C.A.B. Docket No. 5132 *et al.* This motion, which was concurred in by all parties, was granted by the United States Court of Appeals for the District of Columbia Circuit on December 21, 1956. A copy of the motion dated December 12, 1956, together with a copy of the order of the Court of Appeals, dated December 21, 1956, is set forth in the Appendix herein.

IV

Your Petitioners have no way of knowing in what respect, if any, the final decision of the Civil Aeronautics Board in C.A.B. Docket No. 5132 *et al.* may adversely affect the operating rights granted to members of your Petitioners' Associations by the order of the Board dated November 15, 1955. The matter is further complicated by virtue of the fact that three members of the Civil Aeronautics Board, who voted in favor of the operating rights granted members of your Petitioners' Associations on

November 15, 1955, have now left the Civil Aeronautics Board and have been replaced by new members who presumably are not entirely familiar with the proceeding in C.A.B. Docket No. 5132 *et al.* While there is every possibility that the final decision of the Civil Aeronautics Board *may* render moot the opinion and decision of the court below, your Petitioners have no means *now* of knowing that to be the case. Accordingly, petitions for certiorari were timely filed herein by your Petitioners in order to preserve their rights and standing before this Honorable Court.

When the Civil Aeronautics Board issues its final decision in C.A.B. Docket No. 5132 *et al.*, it is quite possible that the Board may make additional findings of fact which will satisfy the opinion of the United States Court of Appeals for the District of Columbia Circuit, dated July 19, 1956, and thereby render moot one of the principal issues raised in the Petitions for Certiorari filed herein February 16, 1957. On the other hand, it is possible that the final opinion of the Civil Aeronautics Board may not make such additional findings of fact or may otherwise change the legal posture of the case in such a manner as to warrant consideration by this Honorable Court of the Petitions for Writs of Certiorari filed herein February 16, 1957.

V

There is every indication that the Civil Aeronautics Board will hand down its final decision in C.A.B. Docket No. 5132 *et al.* within the reasonably near future. The final initial decision of the Examiners in the case was served January 10, 1957, and briefs in support of the initial decision or in opposition thereto

must be filed with the Civil Aeronautics Board by March 11, 1957. The Chief Examiner of the Civil Aeronautics Board has advised all parties that the case will be assigned for oral argument before the Civil Aeronautics Board shortly after March 11, 1957. Under these circumstances, the granting of this motion will not prejudice any party but will merely preserve your Petitioners' legal rights in this Honorable Court until such time as a final decision is rendered by the Civil Aeronautics Board in C.A.B. Docket No. 5132 *et al.*, and thereby avoid the need for consideration by this Court of a matter which *may* be rendered moot.

WHEREFORE, your Petitioners respectfully pray that this Honorable Court defer consideration of the Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed herein February 16, 1957, until sixty (60) days after the final decision of the Civil Aeronautics Board in the *Large Irregular Air Carrier Investigation*, C.A.B. Docket No. 5132 *et al.*, and grant your Petitioners such other and further relief as the premises shall require.

Respectfully submitted,

ALBERT F. BEITEL
JOHN H. PRATT
905 American Security Bldg.
Washington 5, D. C.
Counsel for Petitioners in No. 778

COATES LEAR
Cafritz Building
Washington, D. C.

THEODORE I. SEAMON
Woodward Building
Washington, D. C.
Counsel for Petitioner in No. 779

Dated: February 25, 1957

Proof of Service

The undersigned attorneys for the Petitioners herein, who are members of the Bar of the Supreme Court of the United States, hereby certify that on February 25, 1957, they caused to be served copies of the foregoing Motion upon the persons listed below by mailing copies, in duly addressed envelopes, with first class postage prepaid, as follows:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington, D. C.

Honorable Herbert J. Brownell
Attorney General of the United States
Department of Justice
Washington, D. C.

Howard Westwood, Esq.
Covington & Burling
Union Trust Building
Washington, D. C.

Richard A. Fitzgerald, Esq.
920 Southern Building
Washington 5, D. C.

Daniel M. Friedman, Esq.
Attorney
Department of Justice
Washington 25, D. C.

Franklin M. Stone, Esq.
General Counsel
Civil Aeronautics Board
Washington 25, D. C.

O. D. Ozment, Esq.
Civil Aeronautics Board
Washington 25, D. C.

James K. Crimmins, Esq.
206 Tower Building
Washington 5, D. C.

W. Glen Harlan, Esq.
Citizens & Southern National Bank
Atlanta 3, Georgia

Henry Friendly, Esq.
224 Southern Building
Washington 5, D. C.

L. Welch Pogue, Esq.
730 Southern Building
Washington 5, D. C.

James Francis Reilly, Esq.
1625 K Street, N.W.
Washington 6, D. C.

C. Edward Leasure, Esq.
1701 K Street, N.W.
Washington, D. C.

John F. Floberg, Esq.
800 World Center Building
Washington, D. C.

Robert B. Hankins, Esq.
1610 Ring Building
Washington 6, D. C.

Gerald P. O'Grady, Esq.
1625 I Street, N.W.
Washington 6, D. C.

Hubert A. Schneider, Esq.
B. Howell Hill, Esq.
815 Fifteenth Street, N.W.
Washington 5, D. C.

Amos M. Mathews, Esq.
280 Union Station Building
Chicago 6, Illinois

John T. Lorch, Esq.
231 South LaSalle Street
Chicago 4, Illinois

Charles H. Murchison, Esq.
1016 Ring Building
Washington 6, D. C.

ALBERT F. BEITEL
Attorney for Independent Military Air Transport Association

THEODORE I. SEAMON
Attorney for Aircoach Transport Association, Inc.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,044, 13,045, 13,048, 13052, 13,054, 13,061, 13,063, 13,064, 13,068, 13,116, 13,117, 13,118, 13,120, 13,121

AMERICAN AIRLINES, INC., ET AL., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

AIRCOACH TRANSPORT ASSOCIATION,
QUAKER CITY AIRWAYS, INC.,
INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION,
CAPITOL AIRWAYS, INC.,
Intervenors.

Motion for Further Stay of Judgment

Respondent, with the concurrence of all other parties herein and subject to the right of petitioners to move for sooner issuance thereof only on grounds of undue delay in the Board's proceeding, moves the Court for entry of an order staying the issuance of the opinion and certified copy of judgment in lieu of mandate until sixty days after the Board renders final decision in the *Large Irregular Air Carrier Investigation,* C.A.B. Docket No. 5132, *et al.* (the date on which any authorizations issued in such *Investigation* normally would take effect). In support of this motion, respondent represents:

1. The Court has heretofore stayed issuance of the judgment herein to and including December 28, 1956, pending completion of proceedings by the Board pursuant to the Court's opinion and/or the filing of petitions for writs of certiorari by the intervening supplemental air carriers.

2. The position of petitioners and the intervenor on petitioners' side with respect to the further proceedings which should be had before the Board, and with respect to the relief here requested, is set forth in the letter annexed hereto as Appendix A.

3. The positions of the intervenors on respondent's side with respect to the relief requested are set forth in the letters annexed here as Appendices B and C.

4. This motion does not constitute any acquiescence by respondent with the views and contentions of any of the private parties herein. If the motion is granted, respondent will consider itself free at all times to take such interim or final action as may be required under existing circumstances and as is consistent with law, including such notice to the Court and to the parties as may be required.

5. Prompt action on this motion is respectfully requested so that the proper course of action by all parties may be determined.

Respectfully submitted,

.....

DANIEL M. FRIEDMAN
Attorney
Department of Justice
Washington 25, D. C.

.....

FRANKLIN M. STONE
General Counsel
Civil Aeronautics Board
Washington 25, D. C.
Attorneys for Respondent

We concur:

.....

HOWARD C. WESTWOOD
Attorney for the petitioners and the intervenor
National Airlines, Inc.

.....

ALBERT F. BEITEL
Attorney for Aircoach Transport Association and
Quaker City Airways, Inc., Intervenors

.....

THEODORE I. SEAMON
Attorney for Independent Military Air Transport
Association and Capital Airways, Inc.,
Intervenors

Dated: December 12, 1956

APPENDIX A

COVINGTON & BURLING
701 UNION TRUST BUILDING
WASHINGTON 5, D. C.

December 4, 1956

FRANKLIN M. STONE, ESQ.
General Counsel
Civil Aeronautics Board
Washington 25, D. C.

Re: American Airlines, Inc., *et al.*, Petitioners, v. Civil Aeronautics Board, Respondent, D.C. Cir. No. 13,044 *et al.*

Large Irregular Air Carrier Investigation, Docket No. 5132 *et al.*

Dear Mr. Stone:

As a result of the decision of the Court of Appeals in the above matter and the determination of the Board not to seek certiorari, there is now before the Board the question of what further proceedings should be held in the light of the Court's opinion.

In the interest of an expeditious disposition of this proceeding, of avoiding further legal complications and of reducing the work load on the Board, its staff and other parties to the case, all Petitioners and National Airlines, Inc., Intervenor, in the above court cases, suggest that the Board adopt the following procedure:

The final disposition of this longest and most complex of Board proceedings will soon be at hand. Briefs were submitted to the Examiners some four months ago. It is reasonable to expect that the Examiners' Initial Decision will be rendered in the near future and that oral argument will be heard on the final phase of this proceeding in the early part of next year.

Hence, with the ultimate disposition of this proceeding so near, it would appear to be highly impractical and unnecessary for the Board to engage in further procedures looking towards an interim authorization for the supplemental air carriers. The life of such an authorization would be relatively short and, apart from the many procedural problems that would be involved in such an approach, there is, of course, the very real and serious legal question of whether under present circumstances the necessary statutory findings for such an exemption could be made without further hearing. As a matter of administrative discretion—and we think as a matter of due process—the petitioners should be given an opportunity to be heard, especially in view of the fact that there is now available actual experience with operations under the prior interim authorization, which is most pertinent to the tatutory issues. Under the circumstances, the most reasonable and equitable approach would be to withhold any further interim action, and decide this case *finally* on the merits of the various carriers' applications which will soon be before the Board for decision. In this way the fitness of the applicants, the number of carriers to be authorized and the permanent form and scope of their authority can be resolved at one time. The usual opportunities to brief and argue these issues to the Board would be accorded all parties.

Adoption of this procedure would permit the Board to focus on the ultimate issues in this proceeding and would give the new members of the Board greater opportunity to familiarize themselves with the case and the permanent aspects of the proceeding without the necessity of attempting to deal with the problem of a further temporary authorization.

In the event the procedure suggested above is adopted, Petitioners would agree to further stays of issuance of the opinion and certified copy of judgment in lieu of

mandate by the Court of Appeals pending the issuance of the Board's final decision in the proceeding below. Petitioners and the Board would reserve the right to seek a dissolution of the stay in the event the Board's final decision should be long delayed or deferred.

In short the adoption of the above method of proceeding would eliminate further piece meal handling of this case, would look to a final settlement of the irregular carrier problem on its merits and would in no way be harmful to the public or the supplemental air carriers.

I have been authorized to submit the foregoing on behalf of all petitioners (and the intervenor, National Airlines, Inc.) in the court case. Copies are being sent to Messrs. Seamon, Lear and Beitel.

Respectfully submitted,

/s/ HOWARD C. WESTWOOD
Howard C. Westwood
Attorney for
American Airlines, Inc.

APPENDIX

APPENDIX

APPENDIX B

LAW OFFICES OF
THEODORE I. SEAMON
WOODWARD BUILDING
WASHINGTON 5, D.C.

Telephone
Republic 7-8040

Cable Address
"Wilbersea"

7 December 1956

FRANKLIN M. STONE, ESQ.
General Counsel
Civil Aeronautics Board
Washington 25, D. C.

Re: American Airlines, Inc., *et al.*, Petitioners, v. Civil Aeronautics Board, Respondent, D. C. Cir. No. 13,044 *et al.*

Large Irregular Air Carrier Investigation, Docket No. 5132 *et al.*

Dear Mr. Stone:

As counsel for Intervenors, Independent Military Air Transport Association and Capitol Airways, Inc., in the above captioned proceeding, we have been served with copy of letter dated December 4, 1956 addressed to you by counsel for American Airlines, Inc. on behalf of all Petitioners (and the Intervenor, National Airlines, Inc.) in the aforesaid Court proceeding.

It is our understanding that the procedure suggested in Mr. Westwood's letter contemplates, subject to the approval of the Court, agreement to further stay of transmission of certified copies of the opinion and judgment by the Court of Appeals, pending the issuance of the Board's final decision in the proceeding below.

This is to advise that on behalf of the Intervenors represented herein, we have no objection to and are in accord with continuing stay, as suggested. In agreeing with the procedure, we do not necessarily subscribe to all of the considerations and representations set forth in Mr. Westwood's letter.

This concurrence is, of course, without prejudice to any position which we may take before the Board or in the Courts, with respect to policy or legal issues, including the right of appeal to the Supreme Court from the subject decision of the Court of Appeals.

Respectfully,

/s/ THEODORE I. SEAMON
Theodore I. Seamon

/s/ COATES LEAR
Coates Lear
Attorneys for Independent Military Air Transport Association & Capitol Airways, Inc.

APPENDIX C

LAW OFFICES
MORRIS, PEARCE, GARDNER & PRATT
AMERICAN SECURITY BUILDING
WASHINGTON 5, D.C.

December 7, 1956

FRANKLIN M. STONE, ESQ.
General Counsel
Civil Aeronautics Board
Washington 25, D. C.

Re: *American Airlines* v. *Civil Aeronautics Board*,
D. C. Cir. No. 13,044

Dear Mr. Stone:

As counsel for intervenors on the side of respondent in the above-mentioned case, we have received a copy of the letter dated December 4, 1956, which Howard C. Westwood, Esq., counsel for petitioner, addressed to you.

We would favor a further stay of the transmission of certified copies of the opinion and judgment of the Court until the Board finally decides the *Large Irregular Carrier Investigation*, C.A.B. Docket No. 5132. However, we do not believe that such a stay should be combined with a grant of authority to petitioner to seek a dissolution of the stay, as proposed in the third paragraph on page 2 of Mr. Westwood's letter.

It must, of course, be understood that our concurrence in a request to stay the transmission of certified copies of opinion and judgment is without prejudice to our right to file a petition for certiorari in the case, and to take such

action in the proceeding before the Board as we deem proper.

Sincerely yours,

/s/ Albert F. Beitel
Albert F. Beitel

/s/ John H. Pratt
John H. Pratt
Attorneys for
Aircoach Transport Association
Quaker City, Airways, Inc.

Nos. 13,044, etc.—13,121,

American Airlines, Inc., et al., v. C. A. B.

Before: Prettyman, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of respondent's motion for entry of an order staying issuance of the opinion and certified copy of judgment of the Court in the above cases until sixty days after the final decision of the Board in the Large Irregular Air Carrier Investigation, C.A.B. Docket No. 5132, et al., and it appearing that the other parties to these petitions for review concur in said motion, it is

Ordered by the Court that the aforesaid respondent's motion be, and it is hereby, granted. Respondent will notify the office of the Clerk of this Court of the final decision of the Board in the Large Irregular Air Carrier Investigation.

Per Curiam.

Dated: December 21, 1956.

Office - Supreme Court, U.S.
FILED
MAR 14 1957
JOHN T. FEY, Clerk

Nos. 778, 779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

AIRCOACH TRANSPORT ASSOCIATION, INC., QUAKER CITY AIRWAYS, INC., *Petitioners*,

v.

AMERICAN AIRLINES, INC., ET AL., *Respondents*.

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION, *Petitioner*,

v.

AMERICAN AIRLINES, INC., ET AL., *Respondents*.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION AND OPPOSITION TO MOTION TO DEFER.

HOWARD C. WESTWOOD
Covington & Burling
701 Union Trust Building
Washington, D. C.

JAMES K. CRIMMINS
EDMUND E. HARVEY
Chadbourne, Parke, Whiteside & Wolff
25 Broadway
New York, New York

JOHN T. LOBOE
ROBERT L. STERN
WILLIAM M. DICKSON
Mayer, Friedlich, Spiess, Tierney, Brown & Platt
231 South LaSalle Street
Chicago, Illinois
Attorneys for Respondents

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

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STATUTES

Civil Aeronautics Act of 1938, 52 Stat. 977 et seq., as amended, 49 U.S.C. 401 et seq.:

Section 401(a) [49 U.S.C. 481(a)] 2, 3

Section 416(b) [49 U.S.C. 496(b)] 2, 3, 5, 6, 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 778

AIRCOACH TRANSPORT ASSOCIATION, INC., QUAKER CITY AIRWAYS, INC.,

Petitioners,

v.

AMERICAN AIRLINES, INC., ET AL.,

Respondents.

No. 779

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION,

Petitioner,

v.

AMERICAN AIRLINES, INC., ET AL.,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION AND OPPOSITION TO MOTION TO DEFER.

Since the petitions in Nos. 778 and 779 involve the same case and the same question, this brief in opposition is addressed to both petitions.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Petition, No. 779, pp. 1a-17a) is officially reported in 235 F. 2d 845.

JURISDICTION.

The judgment of the Court of Appeals was entered July 19, 1956 and petitions for rehearing were denied by order entered September 19, 1956. The petitions for writs of certiorari were filed February 16, 1956 pursuant to an order of this Court entered December 12, 1956 extending the time for filing of such petitions. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 646(f).

QUESTION PRESENTED.

Section 401(a) of the Civil Aeronautics Act provides that an air carrier can engage in air transportation only in accordance with authorization in a certificate of public convenience and necessity granted by the Civil Aeronautics Board. Section 416(b) of the Act provides that the Board may exempt any air carrier or class of air carriers from this (or any other) requirement of Title IV of the Act upon finding that enforcement of such requirement would be an "undue burden" on such carrier or carriers "by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest." The only question decided below adversely to petitioners, and therefore the only question petitioners can present to this Court, is whether, in granting such an exemption, the Board made the findings required by Section 416(b).

STATUTE INVOLVED.

Sections 401(a) and 416(b) of the Civil Aeronautics Act, pertinent portions of which are referred to above, are set forth in full in the appendix to the petition in No. 778 at pages 22 and 23, and in the appendix to the petition in No. 779 at pages 18a and 20a.

STATEMENT.

This case arose from the *Large Irregular Air Carrier Investigation* (C.A.B. Docket No. 5132, et al.) which is still being conducted by the Civil Aeronautics Board. Large irregular air carriers had previously been exempted from the certificate requirement of the Act to the extent necessary to enable them to engage in non-scheduled air transportation with large transport-type aircraft.[1] Numerous and significant developments with respect to the large irregulars had arisen since completion of a former Board proceeding as to those carriers. (R. 41458). Many of them had been operating in a manner which presented serious problems of law enforcement, necessitating numerous compliance proceedings by the Board. For these and other reasons the Board instituted the Investigation, to which all large irregulars were made parties, in order to determine what, if any, operating authority such carriers should continue to enjoy, to which carriers such authority should be granted, and whether they should be certificated or exempted. (R. 41458-41461).

Mid-way the evidentiary hearing in the Investigation, the Board directed the Examiners conducting such hearing to suspend the taking of evidence relative to the "fitness"

---

[1] The exemption did not extend to service within Alaska or in international passenger operations.

of individual large irregulars, to receive such further evidence as the parties desired to offer on the general issue of the need for the services of the non-scheduled carriers (the "public interest" questions), and then to render a report on the latter to the Board. It was contemplated that the hearings on "fitness" would be resumed later in the light of such action as the Board might thereafter take. (R. 43934-43937).

The Examiners carried out the Board's instructions, and filed their report. (R. 45934). The "public interest" questions were then briefed and argued to the Board. While considering the Examiners' report, the Board directed the Examiners to resume the hearing on the "fitness" issues. (R. 49312). While the hearings were still in progress, the Board rendered an opinion which discussed the need for the services of the large irregulars, and concluded that the Board's future policy would be not to confine such carriers to non-scheduled transportation but to permit them to engage in plane load charter service on an unlimited basis, and in individually ticketed or waybilled service on flights (scheduled or not, at the carrier's option) not exceeding ten per month for each carrier between any particular pair of points.[2] (R. 48528, *et seq.*). The opinion to this point was framed entirely in terms of action to be taken upon final disposition of the proceeding.

After arriving at this conclusion, the Board included, toward the end of the opinion, one paragraph which gave rise to this case. (R. 48563). This paragraph states that the Board would wait until the end of the Investigation to decide whether the new authority would be granted by certification or by exemption from the Act. Then it states

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[2] This policy would not be applicable to service within Alaska, and would not apply, as to passengers, in international operations.

that, pending that decision, "we see no reason to withhold the enlarged operating authority from this class of carriers." There follows a very brief discussion saying that about thirty of the carriers had not yet been heard in the Investigation on the question of their fitness to receive future authority, that this would take "a considerable period of time", and that to require the carriers to await the conclusion of the Investigation "would constitute an undue burden" upon them. It was concluded, therefore, that an immediate temporary exemption would be issued to all of the carriers (with exceptions not here material) "to operate within the scope of the new policy."

Then, at the very end of the opinion, a set of ultimate findings was entered. The third of these findings named each of the irregular carriers to be exempted, and stated that until final decision in the Investigation enforcement of the Act, insofar as it would prevent each such carrier from engaging in the specified transportation, "would be an undue burden on each of the persons (*i.e.*, the named carriers) by reason of the limited extent of, and the unusual circumstances affecting, its operations and is not in the public interest." (R. 48566). This it will be noted merely repeated the words of Section 416(b) of the Act.

Various of the certificated scheduled air carriers and passenger-carrying railroads had participated in the Investigation before the Board as intervenors. Most of these parties filed with the lower court petitions to review the foregoing exemption order. As a result of a pre-hearing order, certain questions raised in the petitions were briefed and argued to the court, while certain other questions—principally those requiring review of the evidentiary record—were reserved for later disposition if that became necessary. Among the questions thus presented was

whether in purporting to grant an exemption of the scope and nature involved in its order, the Board made the findings required by Section 416(b).

The lower court decided this question in the negative, and the exemption order was reversed and remanded to the Board for further proceedings. Only in respect to this question of the adequacy of the Board's findings to support its order of exemption did the court below rule adversely to the petitioners.

The issuance of judgment of the lower court has been stayed with the concurrence of all parties, until final determination by the Board of the main proceeding, subject to the right of respondents here to move for the issuance of judgment if the Board's proceedings are unduly delayed. The initial decision by the trial examiners has been issued, and the parties are presently preparing their briefs to the Board, although the dates for filing briefs and for oral argument have been postponed until a newly appointed Board member is confirmed. (Notice of Chief Examiner, February 25, 1957, Docket No. 5132, *et al.*)

The Solicitor General has not petitioned for certiorari on behalf of the Board.[3]

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[3] In this connection, this Court should be advised of an inaccuracy in the petition in No. 778 (pp. 18-19). It is stated that the petitioners there believe that the Board has not petitioned for certiorari because of the issuance of the stay of judgment by the lower court. The petition states that the Board "probably feels that it need take no action, because its order will not be set aside by the Court." The fact is, however, that in the Board's motion for a stay, dated October 31, 1956, (p. 3) it stated that it did not intend to petition for certiorari. The papers prepared in connection with the stay finally granted were not filed until December, 1956. See Appendices to Motion to Defer. Thus, the decision not to petition for certiorari had been made long before this stay was granted or agreed upon.

ARGUMENT.

A. Opposition to petitions for writs of certiorari.

1. Section 416(b) of the Civil Aeronautics Act provides that the Board may exempt air carriers or classes of air carriers from other provisions of the Act's Title IV (Air Carrier Economic Regulation) if, and only if, it can and does find that enforcement of such other provision

> "is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

It is not sufficient that the agency merely parrot the bare words of the statute in an over-all ultimate conclusion. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 533; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475; *Florida* v. *United States*, 282 U.S. 194; *American Broadcasting Co.* v. *Federal Communications Commission*, 179 F. 2d 437, 444 (C.A.D.C.); *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 554 (C.A.D.C.), cert. denied, 305 U.S. 613. Basic or subsidiary findings which show that there is a reasonable basis for the conclusion must also be made. Without such findings, the reviewing court is unable to determine whether the agency action meets the statutory requirements. Under such circumstances judicial review would "indeed become a perfunctory process." *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489.

After carefully analyzing the Board's findings, the court below unanimously found that the Board's order contained

> "a conclusion stated in the language of the statute, but the order contains no findings to support that conclusion." (Petition, No. 779, p. 13a).

The opinion continued:

> "We have examined the opinion and the order with care, but we cannot ascertain from them what the Board deems to be the limited extent of the operations of the supplemental carriers which would make a certification an undue burden on the carriers, nor can we determine what unusual circumstances affecting the operations of the supplemental carriers would make certification an undue burden on these carriers. Neither can we ascertain why the Board is of opinion that the certification of these supplemental carriers is not in the public interest." (*Id.*, at 13a-14a).

Since Section 416(b) admittedly requires findings on these points, the court held that the Board's exemption order could not stand.

The fact is that the only reference to these statutory considerations appears in the ultimate finding of the Board which quoted the language of Section 416(b). It can hardly be denied that the lower court was correct when it held:

> "To validate an order of exemption the Board must comply with the statute; *i.e.*, it must find what the statute requires it to find, not in conclusory fashion in the statutory language but in such fashion that a reviewing court can test the validity of the finding." (*Id.*, at 16a).

Thus, the only question in the case is whether the lower court erred in holding that it could not discover, from the Board's opinion and order, just what the Board meant to regard as "limited extent" of operations, or "unusual circumstances" affecting operations, or "public interest" in not enforcing the certificate requirement of the Act.

Neither in the court below nor in their petitions here did or could petitioners point to any explanatory subsidiary findings on these matters. There are none. Petitioners in No. 779 attempt to supply the deficiency in the Board's order of exemption through the same device used in their briefs to the court below (Petition, p. 14). They try to construct findings to support the exemption by reference to a number of unrelated statements taken from different parts of the Board's opinion which made no reference to "unusual circumstances" or "limited extent of operations", and which did not discuss the exemption at all, but only the Board's future policy. To pull together these separate statements made in different contexts as findings with respect to "unusual circumstances" and "limited extent of operations" would be to recast the Board's opinion so as to produce findings which the Board itself never made. The court below rejected this argument (Petition, No. 779, pp. 15a-16a), concluding that:

> "there is nothing to indicate upon what facts or findings the Board based its conclusion that a requirement of certification would be an undue burden upon these carriers. The opinion and the order leave us at a complete loss upon that subject."

All that could be told from the Board's opinion and findings was that the Board's majority deemed it an "undue burden" for implementation of the future policy of the Board to await further steps in the Investigation. Whether this alleged burden was deemed to arise from unusual circumstances affecting operations or from the limited extent of operations, or some combination of the two, or just from some fortuitous circumstance it was quite impossible to tell. Further confusion as to the Board's meaning arose from its having made its ultimate finding specifically applicable to each one of the carriers exempted, whereas its

earlier one-paragraph discussion of the exemption dealt with the exemptees *en masse*. In fact, the Board had not taken any evidence as to many of these carriers, and obviously could not have made a specific finding as to each of them.

Even on petitioners' theory this case involves nothing but an interpretation of the Board's findings, which requires an analysis of the very complicated facts of this case and of the proceeding whence it arose. That is a task properly left to the lower court and certainly should not occupy the time of this Court. Involved is neither conflict of decision among lower courts nor the establishment of any general principle of law beyond the familiar and salutary principle that an agency, in its findings, must disclose what the statute requires in a manner intelligible to a reviewing court.

2. Neither petitioner suggests any sound reasons for issuance of a writ of certiorari. Petitioner in No. 778 tries to show a "conflict" between the lower court's decision in this case and its prior opinion in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 231 F. 2d 483 (C.A.D.C). That case involved a temporary experiment in the carriage of first class mail by air, in which the applicants for exemption would not have been able to join if they had been required to await completion of a certification proceeding. The Court of Appeals thought the findings in that situation, which were directly addressed to the question of exemption and were more specific than in the instant case, sufficient to show the basis for the finding of "unusual circumstances". 231 F. 2d, at 487. Judge Prettyman, who wrote both the opinion in the instant case and the concurring opinion in that one, obviously did not believe that they were in conflict. (See Petition, No. 779, pp. 14a-15a).

Petitioners strain to find "important questions of Federal law" which they erroneously assert that the court below decided. Thus in No. 778 it is said that the operating authority of the supplemental carriers "is at stake" (Petition, p. 10); that the lower court held that the Board should not regulate these carriers by the exemption process (*id.*, p. 14); and that the lower court "lost all interest in the fate of the group of supplemental carriers" (*id.*, p. 18). No. 779 states that the lower court ruled that the Board has "no authority to grant supplemental operating rights to a number of small airlines" (Petition, p. 16). The lower court neither said nor held any of these things. Its conclusion was simply "that the case must be remanded in order that the Board may make findings to support the conclusions which the statute makes necessary to the exercise of the exemption power" (Petition, No. 779, p. 14a). Since the pre-existing operating authority of the irregular carriers, under which they had been operating for many years, was neither in issue before the lower court nor in any way curtailed by its decision, it is apparent that these statements in the petitions are quite without basis.

3. The petition in No. 779 states that there is also presented a question of failure to exhaust administrative remedies. (Petition, pp. 3, 15-16). It is true that the Board retained power to revise downward the ten-flight limitation if, in practice, that authority proved excessive. The petitioner here made some argument below to the effect that the exemption order could not be reviewed by the court absent a showing that the petitioners to the lower court had first requested revision downward of this ten-flight limitation. But the fact that the Board may, at some later stage, retract or reduce these operating privileges does not make the order itself non-reviewable. If it did, an agency could always

defeat judicial review by reserving power to amend or modify its actions. Furthermore, one of the petitioners to the lower court had already requested the Board to take action to revise downward the permissible flights, and the Board, in response to this request, had held it to be "premature". (R. 49207).

4. The non-final nature of the decision below is sufficient reason for denying certiorari. The decision below is non-final in the sense that it has not ended the "litigation by fully determining the rights of the parties, so that nothing remains to be done" by the Board except some purely ministerial act. *Gospel Army* v. *Los Angeles,* 331 U.S. 543, 546. As petitioners themselves point out in their motion to defer consideration of their petitions for certiorari, "the Board may make additional findings of fact which will satisfy the opinion of the United States Court of Appeals for the District of Columbia Circuit, dated July 19, 1956, and thereby render moot one of the principal issues raised in the Petitions for Certiorari." Other avenues of action are available to the Board; it may make entirely different findings, or it may decide to make no new findings as to temporary authorization but await completion of the proceeding and dispose of the applications of the supplemental carriers finally on the merits of each individual applicant's case. This Court should not burden itself unnecessarily with matters which are in such a posture. *American Construction Co.* v. *Jacksonville T. & K. R. Co.*, 148 U.S. 372.

The petitions for certiorari should be denied, for the questions presented are neither substantial nor sufficiently important for this Court's attention.

B. Opposition to motion to defer consideration.

The petitioners have moved to defer consideration of their petitions until after the final decision of the Board in the main Investigation. They point to the fact that a stay of the judgment below has been granted until that time, that the final decision of the Board may or may not moot the decision below, and that oral argument before the Board is expected shortly after March 11, 1957. Since the filing of their petitions the dates for the filing of briefs before the Board and for oral argument have been postponed until the newly appointed member has been confirmed.

Since petitioners have established no possible grounds for the granting of their petitions for certiorari, the motion to defer consideration should be denied. Petitions without merit should not be left standing to serve as a cloud on Board proceedings now in progress.

Furthermore, the decision below will necessarily guide the Board in its findings as to any further exemptions which may be considered in the Investigation, either further interim exemptions or exemptions of a more permanent nature. To defer passing on the petitions for writ of certiorari would prolong uncertainty as to the ultimate status of the lower court's decision, thus adding a further measure of uncertainty to a Board proceeding already plagued by complications.

CONCLUSION.

For the above reasons the petitions for certiorari and the motion to defer consideration thereof should be denied.

Respectfully submitted,

HOWARD C. WESTWOOD

COVINGTON & BURLING
701 Union Trust Bldg.
Washington 5, D. C.

Attorney for
American Airlines, Inc.

CHADBOURNE, PARKE, WHITESIDE & WOLFF
23 Broadway
New York 4, New York

MAYER, FRIEDLICH, SPIERS, TIFFANY, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois

GAMBRELL, HARLAN, RUSSELL, MOYE & RICHARDSON
621 Citizens & Southern National Bank Bldg.
Atlanta 3, Georgia

CLEARY, GOTTLIEB, FRIENDLY & HALL
Southern Bldg.
Washington 5, D. C.

R. S. MAYER
D. FRANKLIN KELL
Delta Air Lines, Inc.
Atlanta Municipal Airport
Atlanta, Georgia

LEAGUER, SCHREURER & CARTER
1701 K Street
Washington, D. C.

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS
World Center Bldg.
Washington 6, D. C.

JAMES K. CRIMMINS
EDMUND E. HARVEY
Attorneys for
Trans World Airlines, Inc.

JOHN T. LOUGH
ROBERT L. STERN
WILLIAM M. DICKSON
Attorneys for
United Air Lines, Inc.

W. GLEN HARLAN
CHARLES A. MOYE, JR.
Attorneys for
Eastern Air Lines, Inc.

HENRY J. FRIENDLY
ROBERT C. BARNARD
LEON LIPSON
Attorneys for
Pan American World Airways, Inc.

L. WELCH POGUE
JAMES P. BELL
730 Southern Bldg.
Washington 5, D. C.
Attorneys for
Delta Air Lines, Inc.

C. EDWARD LEAGUER
HERMAN P. SCHREURER, JR.
Attorneys for
Continental Air Lines, Inc.
and
Northwest Airlines, Inc.

JOHN P. FLEMING
FREDERICK M. ROWE
Attorneys for
Allegheny Airlines, Inc., et al.

D. P. Renda
John W. Simpson
Western Air Lines, Inc.
Los Angeles, California

L. Welch Pogue
James W. Callison

730 Southern Bldg.
Washington, D. C.
Attorneys for
Western Air Lines, Inc.

Adair, Ulmer, Murchison, Kent & Ashby
1016 Ring Bldg.
Washington, D. C.

Charles H. Murchison
Robert Hanking
Macon M. Arthur

Attorneys for
Capital Airlines, Inc.

Whiteford, Hart, Carmody & Wilson
815 15th Street, N. W.
Washington, D. C.

Herbert A. Schneider
B. Howell Hill

Attorneys for
Braniff Airways, Inc.

O'Grady & Marshall
Colorado Bldg.
Washington, D. C.

Gerald P. O'Grady
John Marshall

Attorneys for
Pacific Northern Airlines, Inc.

A. P. Dougherty
Russell B. James
E. B. Leigh
D. O. Mathews
Thornton A. Miller
Guernsey Ogilvy
230 Union Station Bldg.
Chicago 6, Illinois

Amos M. Mathews
J. D. Feeney, Jr.

Attorneys for
Alabama & Southern Railway
Company, et al.

Richard A. Fitzgerald

Southern Bldg.
Washington 5, D. C.

Attorney for
National Airlines, Inc.

Of Counsel.

Dated: March 13, 1957.